

THE STATE OF COLORADO TO THE UNITED STATES

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes

Volume III
(Pages 901 to 1372)

Appeal from the United States District Court
for the District of Nevada.

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(In the absence of the jury.)

LAWRENCE J. SEMENZA

being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Lawrence J. Semenza.

Q. Mr. Semenza, what is your business or occupation? A. Certified public accountant.

Q. You are now, and have been for some time, employed by the defendant, Elmer F. Remmer?

A. I have.

Q. And you have also for some time been the accountant for Cal-Neva, Inc.? A. I have.

Q. And as such you have had in your possession at various times various of the records referred to in this subpoena, is that right? A. I have.

Q. Now, is it not a fact that on July 11, 1949, there were delivered to you, at your request and by representative of the Bureau of Internal Revenue and upon what purports to be a receipt listing certain of the records set forth in this subpoena?

A. Yes, sir.

Q. For this purpose I will show you the yellow paper headed, "Records given to Semenza & Kottinger"—is that your partner? [380]

A. Yes.

Q. "7-11-49," is that in your handwriting?

A. It is.

(Testimony of Lawrence J. Semenza.)

Mr. Campbell: May this be marked for identification?

The Court: We will take a recess until 1:00 o'clock.

(Recess taken at 11:50.)

Afternoon Session, December 6, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Jury present, admonished and excused.)

(In the absence of the jury.)

Mr. Campbell: Now, if the Court please, I wish to state to the Court that apparently there is some misunderstanding, at least as to the location of three of the items called for in the subpoena issued to Mr. Semenza, and that is under subdivision (8), the three checks called for, check in the amount of \$7,724.11, drawn on the Collector of Internal Revenue, from which the signature has been torn; check No. 227, in the amount of \$2,400, drawn to the Mountain City Consolidated Copper Company and signed by Mr. Jeffers, and check for \$5,324, dated August 1, 1946, drawn to the Collector of Internal Revenue. Mr. Semenza informs me that he still has in his possession receipt for a number of checks which were turned over by him to a Revenue agent. That Revenue agent was present and he has been interviewed as to the records in his letter of [381] transmittal, showing that the checks set forth on that list, as well as other matters with respect to Cal-Neva, transmitted to the Reno office of

(Testimony of Lawrence J. Semenza.)

the Internal Revenue agent's office for him to use and then to be restored to Mr. Semenza. Apparently certain of the records involved were returned to Mr. Semenza. We are unable, however, to ascertain definitely that these checks were. Mr. Semenza says he has been unable to locate them in his possession and although a large box and records were given to him, that he had inspected them as late as last Saturday and that those checks were not among those transmittals. We have immediately set in motion investigation to determine if they are still within the possession somewhere of the Bureau of Internal Revenue. However, we have either interviewed or spoken by telephone to every one that we could consider would be concerned in the matter and have been unable to locate those three items, so that is the position in which we find ourselves and I wish to state that frankly to the Court. I think Mr. Semenza, as I say, has a receipt for certain checks which he states were not returned to him and I have no reason to doubt Mr. Semenza's statement in that regard.

Mr. Avakian: Now, if the Court please, we have in our possession a newspaper clipping, which purports to contain photostatic copies of these three checks, and subject to a proper explanation as to the inability to locate the actual checks themselves, we would be agreeable to the use of these [382] newspaper photostats in lieu of the originals. However, we do feel that these matters should be brought to the Court's attention. It is my understanding

(Testimony of Lawrence J. Semenza.)

that approximately ten days before Mr. Semenza was served with the subpoena in this case, he had transferred the various documents, which are called for there, with the exception of these three checks, which he did not have, to Mr. Lohse, who had just come into the case and wanted to become familiar with this. In other words, shortly after the subpoena was served, and about one week before this trial commenced, Mr. Semenza informed Mr. Thompson of the prosecution that all records in his possession called for in the subpoena had been transferred to Mr. Lohse's possession ten days or so before and that he did not have possession of them and could not produce them in court. Now, in view of that, we would like to assign as wilfull conduct on the part of the prosecution to his action in requesting, in the presence of the jury, that Mr. Semenza, whom they knew to be the accountant of the defendant, to produce the records. We feel that was a matter that was improper conduct on the part of the prosecution, which could only have the effect of creating in the minds of the jury the impression that Mr. Semenza's inability to produce these records was the fault of the defense, when they knew in advance he did not have them when they subpoenaed them and when they did not choose to issue a subpoena to the man whom they knew did have possession. [383]

The Court: Wait a minute—let me see if I get this picture. Some one in the Internal Revenue gave Mr. Semenza the custody of the records.

(Testimony of Lawrence J. Semenza.)

Mr. Avakian: Not these three checks, your Honor. We are talking about these three checks. Mr. Semenza, who had possession of them originally, several years ago, turned these checks over to the custody of the Internal Revenue and the Internal Revenue gave him a receipt and that is the last he has seen of them.

The Court: There is nothing for the Court to decide. You can assign any matter as misconduct, that is your privilege.

Mr. Avakian: That is a part of my statement to the Court. Secondly, this matter has been raised before the jury under circumstances which we believe the prosecution could have avoided. In other words, they knew that Mr. Semenza did not have these records when they, in the presence of the jury and knowing he was the defendant's accountant, called upon him to produce them. We therefore feel that the Court should permit the true facts as to these missing checks to be brought to the attention of the jury, to remove from the minds of the jury any implications as to the defense being responsible for the absence of the records and we, accordingly, request your Honor to permit that showing to be made in the presence of the jury to that purpose. [384]

Mr. Campbell: I might state, your Honor, we are discussing three checks out of a vast quantity of records. Mr. Thompson, I might state, informs me that he has no recollection of any such communication as counsel has referred to.

(Testimony of Lawrence J. Semenza.)

Mr. Avakian: We would like to get Mr. Semenza's sworn testimony on that point, if there is any doubt about it.

The Court: I have no idea that counsel on either side of this case would be guilty of any such misconduct. Those gentlemen with whom I am personally acquainted I feel certain would not be wilfully guilty of any such conduct and I do not think any of those gentlemen with whom I am not well acquainted would be, even including those from San Francisco.

Mr. Avakian: Your Honor, the point is, for whatever purpose it may have been, the impression has been left with the jury.

The Court: I do not think counsel will have any objection, and I am sure you will have that opportunity, when Mr. Semenza appears before the jury, I will allow you to make such showing.

Mr. Avakian: We feel we would be deprived of the right to overcome that impression in the minds of the jury unless it is done immediately because the impression is there and we feel that impression should be overcome immediately. Mr. Semenza may not be on the stand for another month, we don't know. [385]

The Court: When the jury returns, if you want to call Mr. Semenza, you may do so.

Mr. Avakian: For the purpose of making that explanation.

The Court: There is no objection, Mr. Campbell?

(Testimony of Lawrence J. Semenza.)

Mr. Campbell: I think the statement, however, should be made by the Court.

The Court: I think at this time you ought to make a statement so your statement will be in the record.

Mr. Campbell: I am willing to do it; however, as I said, I think it would be preferable that the Court make a statement rather than an advocate of either side make a statement, because there is apparently some feeling in the matter.

Mr. Avakian: Our position is based entirely upon fear of the impression that will be left with the jury, your Honor.

The Court: That could be done just by questioning Mr. Semenza.

Mr. Avakian: And I understand we will have the opportunity to do that?

The Court: Yes, you will.

Mr. Campbell: May I interrogate Mr. Semenza concerning these other records?

The Court: Yes, sir.

Mr. Avakian: Your Honor, if counsel is going to go into all other matters, which I understand are not needed now for Mr. Mooney's examination, it might be we will not be able to resume [386] with Mr. Mooney today, in view of his age and physical condition. I wonder if that part can be deferred?

The Court: We must try to cover some of this ground.

Q. (By Mr. Campbell): Mr. Semenza, in addition to the three checks you were requested to pro-

(Testimony of Lawrence J. Semenza.)

duce here a vast number of other records. I believe items 1 to 5 consisted of records which has been placed in your possession by the Bureau of Internal Revenue and for which you gave the receipt or memoranda which have been marked for identification. Can you state, if you will, the course that those records took from your hands?

A. After I received them and brought them to Reno from my office—

Q. You received them when? When was it you received them?

A. In San Francisco—I don't know what the date was on the statement that you showed me.

Q. May I have that. I hand you this dated July 11, 1949, at which time, at your request, I believe you were given the financial records of the B & R Smoke Shoppe, general ledger and general journal, receipts and disbursements record March 1, 1943, to January 31, 1946, receipts and disbursements record January 1, 1946, to December 31, 1946, the following records of 110 Eddy Street: general ledger, cash receipts and disbursements, November 1, 1942, to January 31, 1946, and cash receipts and disbursements January 1, 1946, to December 31, 1946; following records of Transit Smoke Shop: November and December, 1946, [387] cash receipts and disbursements; following records of the Menlo Club: receipts and disbursements, 1947, and general ledger, including only a few recap sheets, cash receipts and disbursements, 1946; Tiny's Restaurant 1946 receipts and disbursements, 1945 receipts and disburse-

(Testimony of Lawrence J. Semenza.)

ments bar and restaurant and 1946 receipts and disbursements bar, file on inventory. Is that all the records that were given to you at that time?

A. No, I also received the B & R Smoke Shoppe.

Q. Those were daily diaries for 1942, 1943, 1945 and 1946, that is correct? A. That is right.

Q. At the time you received those from the Bureau of Internal Revenue, you left that memorandum and agreed to restore them to the Bureau of Internal Revenue whenever they were required, is that correct?

A. I agreed to return them to the Bureau of Internal Revenue. Subsequently Mr. Weaver made up a list of cashier checks listed under Item 7 to me, so I received Item 7 as well.

Q. And your agreement with Mr. Weaver was that you would return them to him, is that correct?

A. When my purpose was served.

Q. When your purpose was served, you would return them? A. That is right.

Q. And you stated your purpose was to prepare returns? A. No. [388]

Q. Or to make certain audits with respect to your employment?

A. It is my recollection that in December and November, prior to my receiving these records, I was employed, along with the firm of Thatcher, Woodburn and Forman, to prepare computation in tax in answer to matter issued by the Treasury Department.

Q. And you were using them for that purpose?

(Testimony of Lawrence J. Semenza.)

A. No. Subsequently to the filing, negotiations were carried on with your office, as I recall, to come to a conclusion on the actual amount of tax owed by Mr. Remmer. In connection with those negotiations it was necessary to obtain the records from the government and we began examination of the records in order to determine what liability Mr. Remmer might have. Subsequently, other attorneys entered the case that were employed by Mr. Remmer and it was understood that another accountant in San Francisco named Nathan J. Friedman was to be employed to assist in it because the attorneys decided that, in view of the fact Mr. Friedman was in San Francisco and would be able to work directly with their office, the records would be sent to him and he would take care of all matters in California and I would retain the records on Cal-Neva and take care of the Cal-Nevada matters. I sent the records on to Mr. Friedman and—

Q. (Interrupting): May I ask you, at all times that you have related, and up until the present time, you have had on file with the Bureau of Internal Revenue a power of attorney as Mr. Remmer's representative, have you not? [389]

A. I have.

Q. All right, proceed.

A. Subsequently Mr. Friedman withdrew from the case and turned the records over to Mr. Golden and Mr. Gillen in San Francisco.

Q. You are referring to the attorneys?

A. Attorneys for the defendant. I was sub-

(Testimony of Lawrence J. Semenza.)
poenaed to appear before the grand jury in Carson
City—

Q. Pardon me just a minute. Prior to that, Mr. Semenza, is it not a fact that Mr. Weaver visited your office in Reno for the purpose of obtaining the return of the records, spoke to your partner, ascertained that you were in San Francisco and talked to you by telephone there relative to the return of the records, in order that they might be used before the grand jury?

A. That is true. In fact, Mr. Weaver spoke to me over the telephone.

Q. Yes, that is what I said.

A. That is right, and I informed him that I did not have the records, the records were in San Francisco, but I would attempt to obtain them and appear with them at the grand jury hearing.

Q. You were subsequently subpoenaed to appear with those records, were you not?

A. That is true. I contacted Mr. Golden's office and was advised [390] that Mr. Golden was absent and was in the service at the moment, so I called Mr. Avakian in Oakland and told him that I desired to have the records, as I had been requested to return them by Mr. Weaver. Furthermore, I had been subpoenaed to appear before the grand jury with the records and that I did not have them in my possession, I would like to get them in order to appear. Mr. Avakian informed me that he had not discussed the matter with Mr. Golden and would advise me later on whether they would be returned

(Testimony of Lawrence J. Semenza.)

to me or not. I was subsequently advised that they could not return them to me, so I appeared before the grand jury and made that statement.

Q. Now, have they been in your possession since that time? A. At intervals they have.

Q. And upon what date was this subpoena served upon you? A. The 16th of November.

Q. Were they in your possession at that time?

A. They were not.

Q. In whose possession were they at that time?

A. They were delivered to Mr. Lohse's office approximately a week before that.

Q. And were they subsequently returned from Mr. Lohse's office to your office?

A. They have never been.

Q. Have you had them in your possession since that time?

A. No. I have had occasion to look at them in Mr. Lohse's [391] office.

Q. So far as you know then at all times since that time they have been in Mr. Lohse's office?

A. Yes.

Q. And your examination has taken place there?

A. It has.

Q. Does that also include the records of the Cal-Neva, Inc., other than the three checks involved here, that is to say, the combined ledger and journal 1937 and 1947, inclusive, pay roll records 1937 and 1946, inclusive, and all invoices, check stubs, cancelled checks, bank statements, gaming sheets for the years 1937 to 1946, inclusive, with the exception

(Testimony of Lawrence J. Semenza.)

of the 35 or 40 which you state have never been returned to you? A. That is true.

Q. And they were all turned over to Mr. Lohse about a week, you say, prior to the service of this subpoena upon you? A. They were.

Mr. Campbell: I think that is all, your Honor. I wanted your Honor to have the entire picture, inasmuch as the controversy which has come up, to which reference has been made by Mr. Avakian, concerns at this time only some three checks.

The Court: All of the records and items, except these three checks, have been accounted for and are available now?

Mr. Campbell: Well, they are not available to us, [392] apparently, your Honor, if they are in the possession of Mr. Lohse, having been put out of Mr. Semenza's possession about a week prior to the service of this subpoena, although they were in his possession both before and after his appearance before the grand jury.

The Court: Those records were turned over to Mr. Semenza by Mr. Weaver of the Internal Revenue Department and you turned them over to Mr. Friedman?

Mr. Semenza: Yes.

The Court: Did you have any authority from Mr. Weaver to turn those documents over to any one else, to let them out of your custody?

Mr. Semenza: I have no authority from Mr. Weaver.

The Court: Did you have any authority from

(Testimony of Lawrence J. Semenza.)
any one connected with the Internal Revenue Department?

Mr. Semenza: No.

The Court: Well, you ask that those records be produced to you, Mr. Campbell?

Mr. Campbell: Yes, your Honor.

The Court: Will you produce them, Mr. Lohse?

Mr. Avakian: We would want to make the record in the presence of the jury.

The Court: Well, we will make the record right now. You may produce the records, Mr. Lohse.

Mr. Lohse: May I confer with counsel, your Honor? [393]

The Court: Yes.

Mr. Lohse: If your Honor please, may I ask Mr. Gillen, who is one of associate counsel, to respond to the Court's inquiry, whether I will produce the records?

The Court: No, I will ask you to produce the records, Mr. Lohse.

Mr. Gillen: I just—

The Court: I am asking him and in a moment I am going to order him. I am just asking Mr. Lohse to produce the records and if he does not, I am going to order him to.

Mr. Lohse: Your Honor please, may I have your indulgence?

The Court: Yes, very well.

Mr. Avakian: Your Honor—

The Court: I am not going to listen to anything.

Mr. Avakian: I just want to make an inquiry.

(Testimony of Lawrence J. Semenza.)

The Court: There is no need for an inquiry. It is plain. Certain records are missing and I order Mr. Lohse to produce them.

Mr. Avakian: They were defendant's records that were turned over voluntarily by Mr. Kyne to the Internal Revenue. They are personal records, is your Honor demanding to produce personal records of this witness?

The Court: I am going to demand any records that were in this subpoena to be turned over by Mr. Lohse to [394] the government.

Mr. Gillen: You are ordering Mr. Lohse to turn over to the government the defendant's records?

The Court: I have not gotten to that point, counsel.

Mr. Gillen: You are requesting Mr. Lohse to turn over defendant's records to the government?

The Court: I don't know whose records they are.

Mr. Gillen: I am telling whose they are.

The Court: I understand they are records that were obtained from the Bureau of Internal Revenue from Mr. Weaver by Mr. Semenza.

Mr. Gillen: Mr. Weaver who originally obtained them voluntarily from—

The Court: I don't know, but they were turned over to the Bureau of Internal Revenue and given to Mr. Semenza on receipt. Here we have a subpoena duces tecum and it is met by a statement that the witness, in whose custody the exhibits were placed by Mr. Weaver, tells us that they were turned over to one of the attorneys for the defendant.

(Testimony of Lawrence J. Semenza.)

Mr. Gillen: May I respectfully suggest to your Honor, has your Honor the entire story?

The Court: I would like to have the story.

Mr. Gillen: Which we are trying to give your Honor. We believe you would see the entire picture in a different [395] light. That is what we are trying to enlighten your Honor now. Would your Honor like to hear it?

The Court: Yes, I will be glad to.

Mr. Avakian: I would like to make a statement.

The Court: Well, I would like to hear from you, Mr. Campbell, on the question.

Mr. Campbell: To be perfectly fair about the situation, it is the contention of the government that all of these various enterprises which, with the exception of Cal-Neva, Inc., which is a corporation, were partnerships, in which the defendant here, Elmer Remmer, was a partner, and in that respect they are the personal records of the defendant, Elmer Remmer. They were not originally obtained by the special agent from the defendant, Elmer Remmer, but were obtained from third parties. I feel it is only fair that that statement be made to the Court.

Mr. Avakian: Thank you, Mr. Campbell, and I am sure the Court is aware of the constitutional rights involved in a situation of this type, and it is in a desire to make all these facts available to the Court, so the Court will understand the legal and constitutional rights of the defendant that we desire to explore this fully and we appreciate Mr.

(Testimony of Lawrence J. Semenza.)

Campbell's statement of their position with respect to it. I am sure Mr. Campbell was aware of the danger of the prosecution's case in the event he would require by compulsion to produce these records. If I may make just one brief statement [396] before questioning Mr. Semenza, I would like to do that, your Honor, is that permissible?

The Court: Yes.

Mr. Avakian: The whole situation with respect to these records is this: the government obtained from parties other than Mr. Remmer records of the various businesses in which the prosecution now says Mr. Remmer was either sole owner or partner. A question may develop during the course of the trial as to whether there was unlawful search and seizure. That is not before us now. A portion of these documents—not all, only a portion—mentioned in the subpoena were subsequently made available by the Bureau after they were taken, to Mr. Semenza for the purpose of enabling him to advise the attorneys with whom he was working as to the accounting features of this case. The balance of those records are still in the possession of the government, as your Honor knows from the motions that were made prior to trial here, in which we were denied opportunity to examine our own records still in the possession of the government. We are in the position then of the government still refusing to make available to us the balance of our records, which are our property, asking us to make available to them the portion which we do have and which

(Testimony of Lawrence J. Semenza.)
we desperately need every night for the preparation
of this case.

With respect to the Cal-Neva corporate records, we will be very happy to make those available to the prosecution, in [397] view of the fact there are no constitutional problems involved with respect to corporate records. Those records are partly in the court room and partly in Mr. Lohse's office. They are very bulky, contain several boxes, we need to refer to them during the course of this trial. We have no objection to the prosecution likewise referring to those corporate Cal-Neva records, subject to our having equal opportunity with them and if they would like to examine them in Mr. Lohse's office during the day while we are in court, we will be glad to do that, but we would like to have them available to us at night, which is the only time we have for working. Inasmuch as we do not have the three checks that are missing, on proper explanation to the jury as to what happened to the originals, we are agreeable to the use of the photostat in lieu of the originals. I would now like, with that brief statement, to question Mr. Semenza as to matters Mr. Campbell questioned him during his examination.

Cross-Examination

By Mr. Avakian:

Q. Mr. Semenza, at the time arrangements were made with you between you and Mr. Weaver, on or about July 11, 1949, for the return to you at that

(Testimony of Lawrence J. Semenza.)

time of a portion of these records listed on the subpoena, did Mr. Weaver and the other representatives of the Bureau also have in their possession other records of these same businesses that are listed in the subpoena? A. They did. [398]

Q. Can you give us an idea as to the volume of those records, in size, were they in various boxes, cartons?

A. I can't tell you how many. There were a number of boxes in the room and I went through them with Mr. Weaver and selected these items which are listed here.

Q. And the items which remained with Mr. Weaver, were they sufficient in volume to fill a number of boxes and cartons?

A. Well, I assume they would fill three or four boxes or more. I can't recall exactly.

Q. Now, your purpose at that time in selecting these particular records to bring back to Reno with you was to enable you to consult with Thatcher, Woodburn & Forman regarding negotiations for possible settlement in the case, is that right?

A. That is true.

Q. At that time there was no indictment of Mr. Remmer? A. No.

Q. And at that time the case had not, so far as you know, been referred to the Department of Justice to consider prosecution, is that correct?

A. Well, I wasn't aware of it.

Q. And your purpose then was simply to try to

(Testimony of Lawrence J. Semenza.)
arrive at a settlement of the case without litigation,
is that right? A. That's true.

Q. Now, you stated that shortly before the grand
jury met in connection with this case, you contacted
Mr. Golden and me. [399] Was that approximately
in April of 1951, late March or early April?

A. I don't recall when the grand jury met.

Q. It was a few days before the indictment was
returned? A. That is right.

Q. When you learned Mr. Golden was in the
service, you contacted me?

A. That is correct.

Q. And I told you I was newly associated with
the case? A. That is right.

Q. And I told you I didn't know the circum-
stances under which these records had been ob-
tained by the Bureau? A. That is right.

Q. And I also told you I didn't know at that
time whether or not they had been obtained in legal
and lawful manner? A. That is right.

Q. And did I also tell you to refer the repre-
sentatives of the government either to me or to
some other legal representative of the taxpayer in
connection with them? A. That is true.

Q. Now then, you were served with subpoena in
this case approximately what date?

A. It is my recollection the grand jury met on
Monday—

Q. I mean for this case for today?

A. Oh, the 16th of November. [400]

(Testimony of Lawrence J. Semenza.)

Q. Do you know approximately how long before that Mr. Lohse had come into the case?

A. Well, it was all of ten days or two weeks.

Q. And was it shortly after his coming into the case that he asked you to make the records available to him in his office? A. He did.

Q. And he stated that was so he could become familiar with the case? A. That is true.

Q. After you were served with this subpoena, did you have a conversation regarding the subpoena with Mr. Bruce Thompson, assistant United States attorney?

A. Well, at lunch one day Mr. Thompson asked me if I was going to hire a truck to bring the records over. I replied I didn't have the records and the subpoena reached me approximately ten days after the records had been transferred to the attorneys.

Q. Where did that conversation take place?

A. At the Elks Club.

Q. That is in Reno? A. That is right.

Q. Do you know approximately how long prior to July 11, 1949, Mr. Weaver, or other representatives of the government, had had possession of the records described on your subpoena?

A. No, I don't know how long.

Q. Did Mr. Weaver, or any other government representative, make [401] any statement to you as to approximately how long they had had them?

A. No, there wasn't any reason for Mr. Weaver and myself to discuss that.

(Testimony of Lawrence J. Semenza.)

Q. Did they state to you whether or not any of them had examined the records?

Mr. Campbell: I submit this is all immaterial.

The Court: We are not concerned with that, are we?

Mr. Avakian: Well, it is the question of the government's opportunity to examine these records at one time.

Mr. Campbell: We intend to offer secondary evidence.

Mr. Avakian: I take it you had these records long enough to have made secondary evidence of them. If you do not want to stipulate, that is all right. That is all, subject to permission to explain in the presence of the jury.

Redirect Examination

By Mr. Campbell:

Q. At the time you obtained these records, isn't it a fact you were taken into a room where the records were and told you could have anything you wanted? A. That is true.

Q. And you were the one who selected these particular records as they were the pertinent records having to do with the matter which you were then investigating, which was the liability of Mr. Remmer? A. That is right. [402]

Q. They were the only records you considered of any use to you in that connection?

A. That's right.

(Testimony of Lawrence J. Semenza.)

Recross-Examination

By Mr. Avakian:

Q. Mr. Semenza, you stated at that time you were simply attempting to assist attorneys in connection with settlement. Have you since been attempting to prepare this case from an accounting point of view for possible trial?

Mr. Campbell: Objected to as immaterial.

The Court: How are we interested in that?

Mr. Avakian: It goes into the matter of adequacy of opportunity, because the purpose then is different.

The Court: The thought I have here is a witness entrusted with records by the Internal Revenue and he turned them over without any authority to some other accountant. They found their way back in his possession and after he was served with subpoena it developed he had turned the records over to one of the attorneys for the defendant. That is the way it appears to me.

Mr. Avakian: Yes, before the subpoena had been served.

The Court: Yes.

Mr. Avakian: I think the important point is this, that the government, under the law, is not entitled to possession of any individual records unless it is done under court process. [403]

The Court: How could the government acquire these records?

(Testimony of Lawrence J. Semenza.)

Mr. Avakian: That is one thing we would like to know.

The Court: Suppose it developed they were given over voluntarily, what is the situation?

Mr. Avakian: It is still the government's right to inspect and not possess. The owner of the records remains the owner, they are still his property. The government, under the statute, has only the right of inspection.

Mr. Campbell: This is the first time this matter has been raised in any court proceeding. Apparently it is the contention of counsel these records were in the government's possession for a long time. If they had been improperly seized or obtained through improper search or seizure, it is their obligation to immediately proceed, through court proceeding to obtain their return. Further, if the Court feels this matter is warranted to go before the jury here, then I think the entire picture should be given to the jury. However, I think in the interests of justice that whatever statement is to be made to the jury should be made by the Court and not by counsel or not through the lips of the witness, unless this whole matter is developed before the jury.

Mr. Avakian: Well, your Honor, if your Honor desires to find out how these records were obtained, Mr. Weaver is present in court. Your Honor could determine from him just how they [404] were obtained.

The Court: If the situation is as it first appeared to me, if these records were records properly

(Testimony of Lawrence J. Semenza.)
in the custody of the Internal Revenue Department—

Mr. Avakian: That is not so.

The Court (Continuing): —and entrusted to this witness, found their way into the hands of one of the attorneys for the defendant and subpoena duces tecum was not complied with, then I would order their production.

Mr. Avakian: Well, I think your Honor is satisfied that that is not the situation. And if there is any doubt about it in your Honor's mind, we would be glad to have Mr. Weaver put on the stand.

The Court: I think we will proceed with the trial now and we will not have any examination of this witness before the jury at this time. What kind of statement do you think the Court should make?

Mr. Avakian: Your Honor, I understand you ruled earlier we could develop this in the presence of the jury.

The Court: Let us get along with this trial.

Mr. Avakian: We don't want an unfair impression left with the jury.

The Court: What is your fear?

Mr. Avakian: The impression I fear that has been left [405] with the jury that the defense has in its custody records that from remarks of Mr. Campbell in the presence of the jury, the defense has not made available.

The Court: I will state to the jury that they must not infer from anything they have heard here this morning that any records are being withheld

(Testimony of Lawrence J. Semenza.)
by the defendant from the government or from the
jury.

Mr. Avakian: May we make an offer of what we
would like to present to the jury?

The Court: Yes.

Mr. Avakian: We would like the opportunity,
your Honor, to prove through this witness, in the
presence of the jury, that insofar as the three
checks of Cal-Neva, which have been mentioned by
Mr. Campbell in the presence of the jury, are con-
cerned, Mr. Semenza voluntarily turned those three
checks over to Mr. Weaver—I am not sure of the
date, I would like to get it from Mr. Semenza—
what is the date of your receipt?

Mr. Semenza: From Mr. Harkness on April 15,
1948.

Mr. Avakian: On April 15, 1948, Mr. Semenza
turned these checks over to revenue agent Harkness
and he has in his possession a receipt for those
checks signed by revenue agent Harkness and those
checks have not been returned to him and he has no
knowledge of what has happened to them since that
time.

The Court: If we allow that, will you confine
yourself to that? [406]

Mr. Avakian: Yes, I will.

Mr. Campbell: Do I understand our request for
production of these records is then without validity?

The Court: No. I have no thought of taking any
such point.

Mr. Campbell: Then will the Court request the
production of the balance of these records?

(Testimony of Lawrence J. Semenza.)

The Court: I have requested them from Mr. Lohse.

Mr. Lohse: If your Honor please, may I then, on behalf of Mr. Remmer, state the constitutional—

The Court: I would like to hear the argument on the constitutional question.

Mr. Golden: The situation is simply this—at the time Mr. Semenza was served with subpoena to produce certain documents which he did not have at the time he was served with the subpoena. Now, if the prosecution feels they have a right, they now know where they are and they should serve subpoena on the person who has them and then we will comply. There is nothing before the court. He said he didn't have the documents.

The Court: The prosecution could very well expect to find those records in the hands of the individual to whom they were delivered by the representative of the Internal Revenue Department.

Mr. Golden: No, your Honor, the attorneys are entitled to use them as well as the accountant. Your Honor, it was only [407] yesterday that we asked the government to produce something and your Honor wouldn't even let us get the name of the man having charge of the material. This goes both ways. I will say that although the records are not physically in my custody, I am defendant's attorney and if they want to serve subpoena on me, when they issue that subpoena we will be glad to comply with it.

(Testimony of Lawrence J. Semenza.)

Mr. Campbell: Mr. Golden knows it would be highly improper to serve subpoena on him as the attorney.

Mr. Avakian: Mr. Lohse is in the same position.

The Court: What do you request the Court to do?

Mr. Campbell: I request the Court, under the circumstances, to instruct that the records called for at least be delivered to the clerk of this court.

Mr. Golden: Just for clarity, if your Honor has in mind as to corporate records, we have offered to make them available under reasonable conditions.

The Court: I have in mind the records mentioned in the subpoena. What do you have in mind, Mr. Campbell? Do you just confine your request to the Cal-Neva records or others?

Mr. Campbell: No, I include all of them, your Honor, with the exception of this check list, but particularly I have in mind those set forth on the memorandum or receipt given by counsel and, of course, there are the corporate records, which [408] as Mr. Golden properly says, do not come within the same circumstances.

Mr. Golden: At the same time, so your Honor may consider both matters at once, we respectfully request the Court to order the government to produce such records belonging to this defendant as it has in its possession, on our demand previously made under Rules 16 and 17 and previously denied by the Court.

The Court: I now order defendant's counsel,

(Testimony of Lawrence J. Semenza.)

who has custody of the records mentioned in the subpoena duces tecum, to produce them and deliver them to the clerk. That is the order of the Court and the records are in Reno, I understand?

Mr. Golden: That is correct.

The Court: It will take a little time to produce them. I will allow reasonable time, tomorrow afternoon at two o'clock.

Mr. Golden: I say this respectfully—your Honor understands, in addition to the legal aspects of the matter, as a practical matter, it is then impossible for us to make any adequate use of that material during the course of this trial. The clerk's office, your Honor, is open from 8:30 to 5:00 and we are in court from 10:00 through 12, and from one to four, or 1:30 to 4:30.

The Court: I wonder if counsel could work out some way [409] of getting around this problem so defendant would have an opportunity to use some of those records or all of them in the preparation of his case.

Mr. Campbell: I think that could be worked out.

Mr. Golden: What order is your Honor going to make to material of the same character in the hands of the government?

The Court: I ruled on that a few days ago.

Mr. Golden: In other words, it is a one-way proposition. I made that request, your Honor, and I renew it.

The Court: I know you did. We will take a recess for five minutes.

2:08 P.M.

(Defendant present with counsel.)

The Court: Are we ready to proceed with the jury now?

Mr. Campbell: Yes, your Honor.

The Court: It is understood you can make that showing you stated in your offer.

Mr. Avakian: Yes, I will limit it to that, your Honor.

(Jury returned into court at 2:10. Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumes the witness stand.

Direct Examination

By Mr. Avakian:

Mr. Avakian: I believe Mr. Semenza has been sworn but I do not believe his name or position was given.

Q. Will you state your full name, please? [410]

A. Lawrence J. Semenza.

Q. And where do you reside?

A. 1113 Greenridge Drive, Reno.

Q. What is your occupation?

A. Certified public accountant.

Q. And you have been engaged in your occupation in Reno for a number of years?

A. I have.

Q. And for a number of years have you been acting for the Cal-Neva, Inc., a corporation?

(Testimony of Lawrence J. Semenza.)

A. I have been.

Q. And also for the defendant in this case?

A. I have.

Q. Before the noon recess, Mr. Semenza, the prosecution requested you to produce, in response to subpoena, three checks drawn on the account of Cal-Neva, Inc., which were identified as checks—the numbers appear to be indistinct so I will describe them, Mr. Semenza—a check dated August 28, 1946, payable to the Collector of Internal Revenue, in amount of \$7,724.11, with the signature torn off; another check dated August 31, 1946, payable to the Collector of Internal Revenue in the amount of \$5,324.11, signed Cal-Neva Lodge by James B. Jeffers; and a third check dated August 31, 1946, payable to Mountain City Consolidated Copper Company in the amount of \$2,400, signed Cal-Neva Lodge, by James B. Jeffers, and I [411] believe you responded that you did not have those records in your possession, is that correct?

A. That is correct.

Q. When is the last time that you recall having had these checks, Mr. Semenza?

A. On April 15, 1948.

Q. And on that date did you turn the originals of those checks over to Internal Revenue Agent Harkness? A. I did.

Q. Do you have in your possession a receipt signed by him, acknowledging that you delivered those checks to him at that time? A. I do.

Q. Have you seen those checks since then?

(Testimony of Lawrence J. Semenza.)

A. I have not.

Q. So far as you know, have they been returned to you?

A. So far as I know they have not been.

Mr. Avakian: I would like to have the receipt received from Mr. Harkness marked for identification. I would like to offer defendant's C for identification in evidence, your Honor.

Mr. Campbell: I have no objection.

The Court: It may be admitted in evidence, defendant's Exhibit C.

Mr. Avakian: Now, your Honor, we have available a newspaper [412] clipping, which purports to be a photostatic copy produced in the San Francisco Examiner on November 15, 1950, of the faces of these three checks, plus the reverse side of the check payable to the Mountain City Consolidated Copper Company, and in order that the examination of Mr. Mooney may continue, we will be happy to offer this in evidence as defendant's Exhibit D.

Mr. Campbell: To which we have no objection.

The Court: Exhibit D is admitted in evidence.

Mr. Avakian: No further questions of Mr. Semenza.

The Court: Have you any further questions?

Mr. Campbell: Not at this time.

(Witness excused temporarily.)

MR. PATRICK MOONEY

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Just before the recess, Mr. Mooney, you had testified concerning the sale on or about August 29th or August 31st of 1946, of certain shares of stock of the Mountain City Consolidated Copper Company to Mr. Remmer in consideration of \$2,400?

A. Right.

Q. Will you relate the circumstances under which that sale was made?

A. I had been after Mr. Remmer for two years previous to buy some stock. He said, "I will take some some day." Cal-Neva was about to close after Labor Day, which was on the 2nd of [413] September. I had a bill against him for the balance of his 1945 tax. He signed the return and I said, "How about the stock?" He says, "I can't take the stock today unless you take it off the revenue bill." He says, "I haven't got enough money in the bank, but I will send you the money from San Francisco." The balance owed to take up the \$2,400. He said, "I will give you a check for the stock and you can turn the income tax in and I will send you the balance." He had until the 15th of September to pay it. I turned the 1040 in and I found out he had a credit on the books. He never did send me the money. To the best of my knowledge no notice or demand was sent to him. No form 469 was ever issued against him and I figured that everything was all right.

(Testimony of Patrick Mooney.)

Q. In other words, as I understand you, that in lieu of paying to the Collector of Internal Revenue all that was due on that day, you arranged with him to subtract the sum of \$2,400 from that amount for the purpose of buying stock in your company, is that right? Is that correct?

Mr. Gillen: I think counsel's question contains matter which is not a fact and not in evidence. He says the money that was due that day, to wit, September 2nd.

Mr. Campbell: I will amend the question.

Mr. Gillen: Just a moment. I am addressing the Court on my objection—when the witness' answer contained the fact that payment wasn't due until September 15th. [414]

Mr. Campbell: I will amend the question.

Q. In other words, as I understand you, Mr. Mooney, you arranged with him on August 31st to deduct \$2,400 from a payment which he was otherwise making to the Collector of Internal Revenue, in order that that \$2,400 might be used to purchase stock in your corporation?

Mr. Gillen: We offer the objection it is leading and suggestive, a compound and complex question. This is his witness, your Honor.

The Court: I will sustain the objection.

Q. Will you relate the conversation which you had with Mr. Remmer on that occasion?

Mr. Gillen: Objected to as having been asked and answered.

The Court: Objection will be overruled.

(Testimony of Patrick Mooney.)

A. I related the entire conversation I had with him I thought. He said he didn't have enough money in the bank. I will start over again. I wanted him to take ten thousand shares, four thousand dollars. He said, "I can't do it." He said, "We will cut it down to five thousand." I said, "You better make it six. I need it for pay roll and expenses for the mine." He made it six thousand shares at 40 cents a share, \$2,400. That is about all the conversation had. He told James Jeffers to give me a check for \$2,400 and give the balance for the Internal Revenue Department. [415]

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Mooney, who was it that first organized this mining corporation?

Mr. Campbell: Objected to as immaterial.

The Court: Objection will be overruled. You may answer the question.

Q. Do you have the question, Mr. Mooney? Who was it that first organized the Mountain City Copper Mining corporation?

A. There were several, George B. Thatcher and myself.

Q. George B. Thatcher?

A. Yes, he died in 1945.

Q. That was Mr. Thatcher, attorney, member of the firm of Thatcher & Woodburn in Reno, is that correct? A. That is correct.

(Testimony of Patrick Mooney.)

- Q. And yourself, were the principal organizers?
- A. Yes.
- Q. Where was the mine located, Mr. Mooney?
- A. In Mountain City, Nevada.
- Q. How much did you personally invest in that mine, of your own personal money, over the years?
- A. Oh, about 8 or 10 thousand dollars, I advanced to make up the pay roll and one thing or another. It broke me.
- Q. And where is the mine located?
- A. About 15 miles from the Idaho line. [416]
- Q. Is that near any other mining property, your mine?
- A. Our mine adjoins the Mountain City Company controlled by Anaconda.
- Q. Your mine is adjacent to that?
- A. It joins it right on the end of it.
- Q. Could you tell me what year it was that this was organized? A. 1937.
- Q. Was there any work done on that mine?
- A. About 130 thousand dollars worth.
- Q. Do you have books and records to show how much money was put into that mine, how much money was expended in the development and working of that mine?
- Mr. Campbell: Objected to as immaterial to the issues of this case, if the Court please.
- The Court: Objection overruled.
- Q. Do you have the question in mind? I will repeat the question, with the Court's permission.

(Testimony of Patrick Mooney.)

Do you have books and records to show the expenditure of approximately 130 thousand dollars?

A. I wouldn't be sure about the amount, but approximately that much.

Q. Approximately 130 thousand dollars since 1937 for development and working of that mine, is that correct? A. Yes.

Q. Now, I take it that Mr. Remmer was not the only one to whom you sold stock in that mine? [417]

A. Oh, no; there were 600 stockholders. That is what the intelligence agents told me. They worked on it—they were all entire strangers to me.

Q. They worked on your matter for three weeks? A. For three weeks.

Q. Did they inspect the mine?

A. Yes, sir, and the stockholders, went to all the stockholders. There was four intelligence agents and a reporter and it covers about 80 pages testimony and I was exonerated by the Internal Revenue Department on their report.

Q. I see. Now, Mr. Mooney, I understood your testimony to be that you had been after Mr. Remmer for a couple of years to invest in the mine?

A. Yes.

Q. And that he had promised that he would get around to doing that, is that correct? A. Yes.

Q. And you asked him more than once to buy some stock?

A. Oh yes, every time I met him.

Q. And finally, on the occasion that you had his 1945 return for him to sign and you were desirous

(Testimony of Patrick Mooney.)

of collecting from him a balance due thereon of some \$7,700, you broached the subject again, is that correct? A. Yes.

Q. Now, at the time you appeared at Cal-Neva, I believe you [418] said it was? A. Yes.

Q. To have him sign the return of 1945 individual tax return? A. Right.

Q. Did he have it prepared and ready for you at that time, a check to cover the amount due?

A. Yes.

Q. And was that check shown to you?

A. I believe it was already made out.

Q. Now, I am going to show you the first photographic reproduction of the check appearing in defendant's Exhibit D. You will find it to be the one at the top of those figures—let me withdraw that question and ask you this question.

Q. Do you recall in what manner the \$7,700 check that was made payable to the Collector of Internal Revenue was cancelled?

A. Well, he would have to cancel it in order to give me the \$2,400. He didn't have money enough in the bank to take care of more checks.

Q. I didn't make myself clear. Do you recall in what manner the cancellation was made of the check, or how it was made effective as a negotiable instrument?

A. I don't know how it was made or anything how it was treated on the stub of the check book or anything.

(Testimony of Patrick Mooney.)

Q. I don't mean that. Did you see anything done to the check? [419] A. No.

Q. Did you see the signature torn off the check?

A. No.

Q. Did you see the check when it was ready?

A. I did not. I don't believe I did.

Q. Let me show the first picture appearing on this Exhibit D of the defendant's and ask you to look at the top portion and see whether or not this refreshes your recollection as to whether or not you have ever seen the check. The top one, Mr. Mooney, the top check that is reproduced.

A. \$7,724, is that right? I don't believe I ever saw it.

Q. You note, do you not, that signature is torn off that check? A. Yes.

Q. Who was that check made payable to?

A. The Collector of Internal Revenue; the cancelled check?

Q. No, the first top check you are looking at now, who was that made payable to?

A. Collector of Internal Revenue.

Q. And for what amount?

A. It was in the full amount of the tax due.

Q. Will you read us the amount there on that check? A. I can't read it.

Q. I am sorry. Do you recall the amount that was due on that return?

A. It was seven thousand dollars. [420]

Q. By the way, that 1945 return—I think that I misunderstand your testimony—that 1945 return

(Testimony of Patrick Mooney.)

had been prepared and signed and returned and filed prior to the occasion when you appeared there to collect what was due on it, isn't that correct?

A. I believe so.

Q. I will show you plaintiff's Exhibits 3 and 4, which have been identified as the 1945 returns prepared by you for Elmer Remmer and for Helen Remmer, his wife, and I will ask you to look at those two exhibits, which I will hand you with the Court's permission, and tell us whether or not that refreshes your recollection that those two returns were prepared by you and filed on June 14th of that year? A. Is the collector's stamp on here?

Q. Yes. With the Court's permission, Mr. Mooney, I will read it.

A. I said is the collector's stamp there?

Q. There is with purple ink, Mr. Mooney, a stamp impression which reads as follows: "Received" and then a large "88" and alongside of that the abbreviation for June, "Jun. 14, 1946, Coll. Int. Rev. Dist. Nev." Do you see that, sir?

A. Yes, sir.

Q. Is that the so-called collector's stamp, showing when the return was received by the Collector of Internal Revenue for the District of Nevada?

A. It showed on the right-hand corner on the face of the return, [421] received on such and such date.

Q. That is correct.

A. I don't know what the others mean.

Mr. Gillen: Well, perhaps we can be assigned in

(Testimony of Patrick Mooney.)

this I believe Mr. Campbell will stipulate that both of these returns, (3) the 1945 Elmer Remmer return, and (4), the Helen L. Remmer return, both bear collector's stamp, showing that they were filed in the collector's office in this District of Nevada, on June 14, 1946.

Mr. Campbell: So stipulated.

Q. So then your purpose on the occasion you sold Mr. Remmer the stock was to collect from him something in excess of seven thousand dollars due on these two returns due September 15th, is that correct? A. Yes, sir, that is correct.

Q. And this was just before the closing of Cal-Neva for the summer season, that year the closing date being Labor Day? A. 1946?

Q. 1946.

A. He closed it, I think, right after Labor Day, which was the 2nd of September.

Q. And I believe this exhibit, these checks, bear the date, the first check made payable to the Collector of Internal Revenue, bears date of August 28, 1946, and the two additional checks appearing on there bear date of August 31, 1946. The collector's [422] check which was prepared for you, which you said had to be cancelled, bore date of August 28, 1946, and the other two checks, one of which was to the Mountain City Copper Company, bore date of August 31, 1946. Now, were those two checks prepared in your presence on the same day that you were there?

A. James Jeffers gave me the check on that day.

(Testimony of Patrick Mooney.)

Q. On the 31st of August?

A. If that is the date.

Q. Were they prepared there in your presence?

A. Yes.

Q. Now is this your testimony, that on this occasion you again then approached Mr. Remmer and spoke of purchasing some stock, is that correct? A. Yes.

Q. And he told you that he didn't have enough money available in the bank in Nevada to be able to pay his full balance on his return and in addition to that buy some stock, is that correct?

A. Correct.

Q. Now you say you had wanted him to buy ten thousand shares of stock?

A. I talked to him about it.

Q. Which would have been an amount of four thousand dollars, is that correct?

A. Four thousand dollars, correct.

Q. And he told you he couldn't purchase that much but he would [423] purchase a lesser amount, he would purchase five thousand, or half that much, is that correct?

A. Right. I pressed him to buy it, I needed it for the pay roll.

Q. Had it been the practice and policy of the company not to run into debt, but only operate and work the mine so long as you had money to work the mine and meet the pay roll?

A. Correct. In 12 years we never passed a pay-day.

(Testimony of Patrick Mooney.)

Q. And Mr. Remmer agreed then to buy six thousand shares? A. Six thousand shares.

Q. And that incurred the obligation of \$2400?

A. Yes.

Q. And is it my understanding of your testimony that he told you if you wanted him to pay you for the stock then, that he would give you the \$2400 in the form of a check, but that he would only be able to pay a portion of the amount that was due on his income tax return for 1946 and that he would send you the balance from San Francisco?

A. Right.

Q. And he still had better than 15 days before he became delinquent, is that correct?

A. Correct.

Q. So at that time, Mr. Mooney, he gave you two checks instead of one? A. Yes. [424]

Q. One of which was for \$2400, payable to the Mountain City Copper Company, and the other of which was for \$5324.11, payable to the Collector of Internal Revenue, is that correct?

A. As far as I remember. I know about the \$2400.

Q. And he gave you also a check for the Collector of Internal Revenue? A. Yes.

Q. Would you look at the two additional checks that appear, the two checks that are reproduced in this newspaper clipping, defendant's Exhibit D, and tell us, if you can, whether or not you recognize those checks as checks given you that day by Mr. Jeffers?

(Testimony of Patrick Mooney.)

A. That is \$5324 for the Revenue Department. I can't make it out exactly. The \$2400 I can read.

Q. The original check on this exhibit shows check payable to the Collector of Internal Revenue in the sum of \$7724.11.

A. Deduct \$2400 and you have the answer.

Q. \$2400 deducted from it left check which he gave you for the Collector of Internal Revenue for \$5324.11, is that correct? A. Yes.

Q. Upon leaving Mr. Remmer on that occasion you expected, did you not, Mr. Mooney, that in due course, either by his personal appearance in Reno or through the mail, you would receive the balance due on the \$7724.11, is that correct?

A. Yes. [425]

Q. That you would receive the difference yourself? A. Yes.

Q. Now as a matter of fact, it came to your attention, did it not, that there was a refund, or notice of a refund, due to Mr. Remmer?

A. No notice. It was on the books in the revenue office.

Q. It was reflected on the books of the revenue office that Mr. Remmer was entitled to a refund?

A. Yes.

Q. Which would have more than covered the amount of \$2400, is that correct?

A. I believe it was around \$2600.

Q. So therefore Mr. Remmer was not required to pay the additional \$2400, is that correct?

A. Yes.

(Testimony of Patrick Mooney.)

Q. Was that amount that was due to Mr. Remmer as a refund applied to the balance of his tax owed in 1946?

Mr. Campbell: Objected to as not the best evidence.

The Court: He may answer the question.

Q. Do you have the question in mind or would you rather I repeat it?

A. There was somebody told me in the office—

Mr. Campbell: Now—

Mr. Gillen: You have to testify to your own knowledge.

Mr. Campbell: That is why I am objecting, as not the [426] best evidence.

Q. Do you have any personal knowledge of how that refund was handled by way of any credit to Mr. Remmer and Mrs. Remmer?

A. How it was handled? It was credited on his 1945 tax.

Q. And was that within the right of the Collector of Internal Revenue to apply a credit on any balance due on a tax?

A. Certainly, a taxpayer is entitled to have a credit if it exists on the books.

Q. Now, Mr. Mooney, the returns that you have stated that you made out for Mr. Remmer and for Mrs. Remmer through the several years that you recounted, they were for individual returns, is that correct? A. Correct.

Q. You had nothing to do with any partnership or corporate returns? A. Nothing.

(Testimony of Patrick Mooney.)

Q. You had nothing to do with returns of Cal-Neva, Inc., corporation? A. Oh, no.

Q. You had nothing to do with the returns that were made out for any enterprises in any of the other partnerships? A. No.

Q. The only thing that you had to do with this, is this not a fact, was to find out what financial benefit or profits or earnings Mr. Remmer derived from any of those enterprises, is that [427] correct?

A. The distributed share to each partner.

Q. And the only reason you did that was to be able to make out a true and accurate report of his individual income?

A. Right. I never saw a book.

Q. Now the individual returns that you made out usually bore a notation on the face, "Taxpayer's figures without audit," is that correct?

A. That is correct. I think that is on all my returns.

Q. And that is a very common thing where any accountant or a deputy collector, or any other person other than the actual taxpayer, accepts figures given to him as the income of the taxpayer without making a personal audit, to put that notation on it?

A. The only figure a deputy collector could put down is the figure given by the taxpayer or the accountant.

Q. Now, when you have stated or placed on the returns, individual returns, of Mr. Remmer and Mrs. Remmer "Taxpayer's figures," you didn't

(Testimony of Patrick Mooney.)

mean by that, did you, Mr. Mooney, that you received those figures actually and personally from the taxpayer? Do you understand my question?

A. I understand your question. I received them from Mr. Remmer's bookkeeper.

Q. In other words, you mean by that, not that you received these figures actually and personally from the taxpayer himself, Mr. or Mrs. Remmer, but rather from somebody representing [428] them?

A. Oh, no, he never looked at a figure.

Q. He never looked at a figure? A. No.

Q. Now, as I recall your testimony—and correct me if I am wrong, Mr. Mooney—in the earlier returns that you made for Mr. Remmer, you got your information from Mr. George L. Simmons, a public accountant in El Cerrito, California?

A. Yes, sir.

Q. And then later on you got some figures from Mr. Kyne, Willie Kyne? A. Yes.

Q. And also some figures from a public accountant by the name of Ayton?

A. I think that is his name.

Q. And then subsequently that Mr. Harold Maundrell took over the management of the books and you got your figures from Mr. Maundrell?

A. Right.

Q. And those figures were figures referring to the distributive shares to Mr. Remmer and also to Mrs. Remmer from profits of partnership enterprises, is that correct?

(Testimony of Patrick Mooney.)

A. Yes, partnership or joint venture, which you wish to call it.

Q. And of course that included all of those things, included initially the 21 Club and the San Diego Social Club in El [429] Cerrito, and still later on included the Menlo Club and the 186 Eddy Club, the 110 Eddy Club and the other enterprises that have been mentioned here, is that correct?

A. Right.

Q. Other than the occasion that you testified to here earlier this morning, when you stated that there was an occasion when Mr. Remmer told you he had won some money on the Kentucky Derby and sought your assistance in making out the tax return—

A. Yes.

Q. —other than that occasion, did you, on any other occasion throughout the years that you made out Helen Remmer's and Elmer Remmer's individual income tax returns, ever get any figures from Mr. Remmer?

A. Except on three or four occasions.

Q. Now, the three or four occasions were occasions when Mr. Remmer spoke to you concerning some charitable donations he had made, is that correct?

A. Right.

Q. And if I remember correctly, that was with relation to the 1946 return, is that true?

A. '45.

Q. 1945 return, and do you recall what his inquiries were at that time, what information he sought from you?

(Testimony of Patrick Mooney.)

A. He says, I gave \$7500 to purchase the Catholic playground at St. Thomas Aquinas Church for the church; that is, he contracted— [430] he paid five thousand in 1945 and 2500 in 1946.

Q. That is, he signed a commitment to pay and paid down five thousand and agreed to pay an additional 2500 toward this playground of St. Thomas Aquinas Church?

A. Yes, St. Thomas Aquinas purchased that property for \$7,500 and he and three or four of his associates paid off the full amount of the money. The Masons had allowed the children the use of the ground for 20 years. Property had advanced and they were going to sell it and Mr. Biltz had it under option and he knocked off his commission, since the church was going to buy it.

Q. Now Mr. Remmer asked for some opinion or advice of yours regarding that?

A. No advice, only he had given the money to Mr. Graham.

Q. What was the question he put to you?

A. He said, "Don't forget that; I don't know whether there is a record in the partnership return or not." It had no relation to the partnership because it was individual contribution.

Q. It was his individual contribution?

A. So far as I know.

Q. And you told him that you had that information, is that correct, that charitable contribution, in mind? A. Yes.

Q. Now, did Mr. Remmer at that time, or at

(Testimony of Patrick Mooney.)

any other time, speak to you about another contribution that he had made, charitable? [431]

A. Yes, on the 1947 return he made a contribution of a Chrysler station wagon to the crippled children in Carson Valley.

Q. Do you know the amount of that?

A. \$2700. That was the valuation of the Chrysler Town and Country wagon.

Q. In other words, he purchased an automobile, station wagon?

A. It might have been used a couple of hundred miles before they got it.

Q. He purchased that for the crippled children of what valley? A. Of Carson Valley.

Mr. Campbell: What year was that for?

A. 1947.

Q. Was that purchase made in 1947 or 1946, as you recall?

A. I think it is on the 1947 tax return as deduction. I had to cut it down. He was over-contributed. I had to cut it down on the 15 per cent contributions.

Q. Now, Mr. Mooney, do you recall testifying this morning regarding the occasion when you were compelled, by reason of the shortness of time, to use the figure that had been given to you earlier that year as an estimate for the initial return, with a view to making an amended return? Do you recall that?

A. What year are you speaking of?

Q. Well, I will get that for you. Do you recall

(Testimony of Patrick Mooney.)

testifying this morning with regard to plaintiff's Exhibit 1, the 1944 return of Elmer Remmer and Helen Remmer? [432] A. Yes.

Q. Which you stated was based upon an estimate given to you in the summer of 1943?

A. Yes. If it was an estimate it is 2650.

Q. Now, you stated this morning, if I recall your testimony this morning, that you had obtained from Mr. Remmer an estimate of 20 thousand dollars for his income for a year?

A. I think one day at Reno he figured that would be about right.

Mr. Campbell: I suggest, if the Court please, the witness be shown the exhibit. It is difficult to hear and I am afraid he misunderstands some of the things.

Mr. Gillen: I wonder if counsel has the 1040 estimate? It is not in evidence—the original estimate.

Mr. Campbell: No, I do not. I will ascertain if one has been filed. If it has been, I will have it produced.

Mr. Gillen: I think we had testimony there had been an estimate of 20 thousand dollars made.

Q. He made an estimate of 20 thousand dollars?

A. A rough guess.

Q. And then when the time came to make the return, you testified this morning something regarding the information or data being in the hands of a Mr. Lewis, do you recall that, a former Collector of Internal Revenue?

(Testimony of Patrick Mooney.)

A. Mr. Lewis was connected with the Internal Revenue at San [433] Francisco in 1944 or 1945. He opened an office in Montgomery Street.

Q. You stated this morning in your testimony that because of the shortness of time and because if you waited to get the information, Mr. and Mrs. Remmer would have been delinquent, that you made a return based on 20 thousand dollar estimate, is that correct? A. Correct.

Q. And you said you advised Mr. Remmer at that time by letter on March 20, 1945, the letter being plaintiff's Exhibit 68, which was provided by the plaintiff, that you were returning them the two forms, that they must sign immediately and that they owed you \$1070 each; do you recall that?

A. Yes.

Q. And do you recall in that letter you said: "I took it off your estimate for last summer. If there is any change to be made, we will make it at our first trip to Reno, as you may want to raise the amount. Bring all the data from the different places, so that we may file a proper amended return"; do you recall that? A. Yes.

Q. And do you recall you mentioned not only was this return necessary to be filed by March 15th, but also there should be a declaration of expected income for the year 1945 filed by March 15th? [434]

A. Yes.

Q. Now, do you recall that your letter was not written until March 20th? Your letter bears date of March 20th.

(Testimony of Patrick Mooney.)

A. He had an extension, as far as I know.

Q. Now, when the returns are made on March 15th, what is the policy of the Internal Revenue Department for the District of Nevada, in regard to length of time it takes them to open mail and whether or not mail coming before it is completely open goes in without question?

Mr. Campbell: I don't understand that question. I object on the ground it is unintelligible.

Mr. Gillen: I think Mr. Mooney understands it.

The Court: Let us have the question read.

(Question read.)

Mr. Gillen: I don't understand the question myself.

Q. Mr. Mooney, was it the policy of the Collector of Internal Revenue of the District of Nevada to allow mail coming in, returns coming in through the mail after March 15th of each year, or being dropped into the office, to be considered as having been filed on time, provided it arrived before you finished opening all the mail?

Mr. Campbell: That is objected to, if the Court please, on the grounds it is immaterial, that the witness obviously doesn't know what the present custom or method is; he has been retired, he says, a number of years. [435]

The Court: He might have known at that time.

Mr. Campbell: That wasn't the question.

Q. What was the custom at that time?

A. It took two weeks to open mail.

Q. And anything that got in before all the mail

(Testimony of Patrick Mooney.)

was opened was considered in the entire mail, is that correct? A. I guess that is right.

Q. Well, was that the policy? A. Yes.

Q. Now, you testified this morning that although you so admonished Mr. and Mrs. Remmer in your letter that they, Mr. Remmer, might want to increase the amount that was shown in the return, that he never did increase the amount that was shown in the return or gave you any other papers; is that correct?

A. I will bring that up now. Mr. Campbell has a pencilled return made in 1946 on 1944 return. He showed it to me at the time of the meeting of the grand jury.

Mr. Gillen: Do you have that with you?

Mr. Campbell: I don't know to what he refers.

A. 1944 amended return.

Mr. Campbell: Isn't that attached to the original exhibit? I think the 1944 return, plaintiff's Exhibit 1, is a pencilled return.

Mr. Gillen: It is not an amended return here, counsel. [436] It should be amended return.

A. It is marked amended on top.

Q. You have handed me a pencilled 1944 return marked amended return, for Helen L. Remmer. Was there one similarly for Elmer Remmer?

A. Exactly.

Mr. Campbell: I will have to look it up.

Mr. Gillen: May it please the Court, Mr. Mooturn for Helen L. Remmer, increasing the amount

(Testimony of Patrick Mooney.)

of return and tax due. I should like to have this marked as defendant's next in order for identification.

The Court: E for identification.

Mr. Gillen: So we may understand, it is my understanding that Mr. Campbell is seeking to find the amended return for Elmer Remmer.

Mr. Campbell: That is presuming there is such a thing.

Q. Well, Mr. Mooney, Mr. Campbell showed you, at the time the indictment was returned in this case, in this city at the grand jury, a pencilled amended return for Elmer Remmer, is that correct?

A. Yes, it was made in my handwriting. I identified the handwriting. I don't know whether it was signed or not.

Q. Now, Mr. Mooney, after writing the letter of March 20th of the year 1945, to Mr. and Mrs. Remmer, advising them that you were making the return based on the estimate that they had [437] given you, or Elmer Remmer had given you, the previous summer, and that he might want to increase the figures, did you talk to Mr. Remmer at any later time subsequent to the writing of that letter concerning that matter?

A. I don't think so.

Q. Let me ask you if it isn't a fact that you talked to Mr. Remmer in Reno and Mr. Remmer told you as to any other partnership enterprises or anything, he knew nothing about them personally, and you could get all the information from the bookkeepers?

(Testimony of Patrick Mooney.)

A. He always referred me to the bookkeeper.

Q. And didn't he do that in regard to the 1944 return?

A. I have forgotten whether he did or not.

Q. You don't recall whether he did or not?

A. I don't recall.

Q. Let me ask you, Mr. Mooney, if you have any recollection of having gone to Mr. Willie Kyne and receiving additional information from which you made the amended 1944 return? A. Yes.

Q. And where did you see Mr. Willie Kyne?

A. In San Francisco.

Q. Now, you mentioned here, Mr. Mooney, that you obtained your information concerning the partnership enterprises from various bookkeepers in San Francisco? A. Yes. [438]

Q. And you stated that you did that on your own time and not on government time?

A. Exactly.

Q. And that you received from Mr. Remmer your exact expenses? A. That's all.

Q. It is true, is it not, in the United States government, employees of the government have two types of leave each year, one known as sick leave and one known as annual leave or vacation leave, is that right? A. That is right.

Q. And the sick leave you can take off any time you are sick up to a given point, is that correct?

A. Any time you are sick, if you are not faking.

Q. And your annual leave you can take a day or two at any time up to the amount of leave you are allowed for each per annum?

(Testimony of Patrick Mooney.)

A. Deducted off your total.

Q. Total annual or vacation leave, is that correct? A. Yes.

Q. And those trips to San Francisco, did you make any on week ends? A. Sometimes.

Q. They were off your annual leave?

A. All of them. I never did anything on government time.

Q. Now, Mr. Mooney, I hold in my hand defendant's Exhibit E, [439] which I will identify for you as amended return for 1944 for Helen Remmer, made out in pencil, in your handwriting, which you said was a counterpart of identical one for Elmer Remmer. It is true, is it not, that you filed both of these amended returns and that you collected what was due, the additional money that was due, and turned it in on those amended returns and that that created the credit?

A. Yes, there is a book charge, interest, probably two years in there, 1944.

Q. And there was interest due?

A. \$160 there is marked up.

Q. \$166.60 interest? A. For each one.

Q. For each one?

A. It must have been two years, at the amount of 15%.

Q. These were filed and collected?

A. So far as I know. They might have got lost. The money was paid.

Q. But the money was paid?

A. Yes, I think I turned the money in on two

(Testimony of Patrick Mooney.)

slips, two credit slips, and the returns were filed two weeks afterwards or maybe a month.

Q. Now, did you, during the years that you were making out these individual returns, did you correspond with any representatives of Mr. Remmer concerning his distributive shares out of [440] any of the business enterprises in which he was interested?

A. With Mr. Simmons and Mr. Kyne.

Q. Do you have any copies of those letters in your possession?

A. There are some there to Mr. Kyne and Mr. Simmons, if Mr. Pratt will give me the file.

Mr. Gillen: May we have the Court's permission for Mr. Mooney, Jr., to pick the documents out of his father's file?

The Court: Yes.

Mr. Gillen: Mr. Mooney hands me, may it please the Court, what purports to be—

Mr. Campbell: It might be marked for identification before any description is made, if the Court please.

Mr. Campbell: All right. I was just going to identify them as being carbon copies of letters, without going any farther. Three carbon copies of purported letters have been marked for identification, may it please the Court, and I will hand them to counsel now. They are defendant's F, G, and H.

Q. Mr. Mooney, the three single sheets that you have handed me, which appear to be carbon copies of letters written by yourself to other persons, let

(Testimony of Patrick Mooney.)

me ask you whether or not all three of them represent inquiries made by you of bookkeepers familiar with the partnership enterprises in which Mr. Remmer had an interest, inquiring concerning certain data to enable you to make an authentic and correct individual return for Mr. Remmer and Mrs. [441] Remmer?

A. Yes, to Mr. Kyne and Mr. Simmons and Mr. Maundrell.

Q. Mr. Kyne and Mr. Simmons?

A. Mr. Kyne and Mr. Simmons.

Mr. Gillen: If there is no objection, I will offer them in evidence.

Mr. Campbell: We object to them until further foundation is laid.

Mr. Gillen: Very well.

Q. In regard to letter written by you May 23, 1945, to Mr. Frank E. Simmons, 313 San Pablo Avenue, El Cerrito, did you receive in response any information you sought in this letter, from this letter?

A. I believe I did. Mr. Simmons was very prompt.

Q. And the information that you received did you utilize in preparing 1040 individual income tax form for Mr. and Mrs. Elmer Remmer?

A. Yes, if there was any income for that year.

Mr. Gillen: I offer the May 23, 1945, letter as Defendant's Exhibit F in evidence.

The Court: It may be admitted.

Q. Now, Mr. Mooney, with regard to what appears to be a carbon copy of letter written by your-

(Testimony of Patrick Mooney.)

self to Mr. Frank E. Simmons, 313 San Pablo Avenue, El Cerrito, California, dated May 10, 1946, do you recall whether or not you received any response in any form from Mr. Simmons regarding the information you [442] desired and requested in that letter, to enable you to make individual income tax returns for Elmer Remmer and Helen Remmer?

A. If I didn't get a response, I called on him probably. I notice one occasion where partnership returns is in the hands of Mr. Lewis. He was former Collector of Internal Revenue, Northern California Division.

Mr. Gillen: We offer in evidence Exhibit G.

Mr. Campbell: I think it is immaterial here. I have no objection.

The Court: It may be admitted.

Q. And finally there is what appears to be carbon copy of letter written by yourself to Willie Kyne, 50 Mason Street, San Francisco, re: Elmer Remmer, under date of March 7, 1947. Do you have any recollection whether or not you received a response in any form regarding the information and matters that you desired to obtain in that letter?

A. Some time afterward Mr. Kyne and I talked the matter over.

Mr. Campbell: Objected to as not having been shown it was brought to the knowledge of the defendant or that any information or any other of the information elicited therefrom.

(Testimony of Patrick Mooney.)

The Court: Objection overruled. Admitted in evidence, Exhibit H.

Q. Mr. Mooney, you have handed me carbon copy of a letter which you wrote on May 23, 1945, to Mr. Frank E. Simmons, 313 San Pablo Avenue, El Cerrito, California, which reads as [443] follows: (Reads Exhibit F.)

Q. You recall writing that letter, do you?

A. I do.

Q. And did you receive some information, whether it affected the return that you were making for Mr. Remmer or not, did you receive some information or response from Mr. Simmons?

A. Yes, that's the time, I believe, that he informed me that the partnership was all in the hands of Mr. Lewis and I couldn't get it and never did get that return.

Q. Let me ask you this, Mr. Mooney, now calling your attention to Defendant's Exhibit G, I will ask you if you recall writing this letter, May 10, 1946? (Reads Exhibit G.) Undoubtedly signed by yourself in the original, because it bears the stenographic notation at the bottom, "PM/M." Do you recall what was the occasion of writing the letter?

A. Well, the partnership return, I don't believe I ever saw it.

Q. And that was the same Mr. Lewis you referred to was at one time Internal Revenue Collector at San Francisco? A. That is right.

Q. And then went into private practice as a lawyer and accountant?

(Testimony of Patrick Mooney.)

A. He was an attorney.

Q. Now finally, Mr. Mooney, do you recall that you wrote a letter on March 7, 1947, addressed to Willie Kyne, 50 Mason [444] Street? (Reads Exhibit H.) Now you recall writing that letter?

A. Yes.

Q. Now will you tell us what you had in mind when you made the proposal in the letter to Willie Kyne on March 7, 1947, that Mr. Remmer might be able to deduct the costs or his investment in the Menlo Club over the period of time on his lease and save himself some money?

Mr. Campbell: Objected to as immaterial what Mr. Mooney had in his mind.

The Court: Objection will be overruled. You may answer the question.

Mr. Campbell: Further, it is not within the scope of direct examination.

The Court: You may answer the question.

Q. Mr. Mooney, his Honor says you may answer that question. Would you care to have the question read?

A. No. I was thinking of amortizing over the period of his lease the amount for 1945 for 8 months, or 18 thousand some odd dollars and for the full year it was 28 thousand and some dollars, 700 dollars, I think, and he took it over a three-year period.

Q. You had in mind to have him spread that out over the period of time of his lease?

A. Yes. [445]

(Testimony of Patrick Mooney.)

Q. And his lease was for how long?

A. Five years Mr. Maundrell told me. I understood afterwards it was ten.

Q. Mr. Maundrell was under the impression it was five years but it was ten?

Mr. Campbell: Objected to Mr. Maundrell's impression.

The Court: Yes, that may go out.

Q. Well, in all events, from the information you had in your hands at that time, you had the impression it was a five-year lease?

Mr. Campbell: Object to this, what is his impression.

The Court: I think we have gone far enough on that question. Objection will be sustained.

Q. Well, it was your plan to suggest an amortization of his lease over the period of five years?

Mr. Campbell: Same objection. If the Court please, it is immaterial what this man's plan was.

The Court: It is practically the same as he already answered. He may answer the question.

A. He had to recover an investment of over 140 thousand dollars.

Q. Now, Mr. Mooney, do you have any recollection of having discussed with Mr. Maundrell the matter of amending a partnership return in connection with the Menlo Club for 1945?

A. Yes. [446]

Mr. Campbell: Just a minute—I am going to object as to third parties.

(Testimony of Patrick Mooney.)

The Court: Objection sustained. All right, answer this yes or no.

A. Yes.

Q. As a result of such a discussion, did you prepare a proposed amended or addenda to the amendment of partnership return for the Menlo Club for that year?

Mr. Campbell: Objected to as not within the scope of direct examination. If counsel desires to make him his own witness, that is a different matter.

The Court: Objection sustained.

Mr. Gillen: Of course, may it please the Court, the theory that it appears the government is pursuing here—

The Court (Interceding): The reason I did not permit testimony in regard to amended returns it came out through Mr. Mooney's presentation of that pencilled copy of 1944 return. If you desire to bring anything further out on these matters, you may do so by making Mr. Mooney your own witness.

Mr. Gillen: Of course, I have no fear of making Mr. Mooney my witness. I may make him my witness at some later time, but since there is involved in this case the question of fraudulent intent upon the part of the defendant, I think [447] cross-examination—

The Court: Let me have the question.

(Question read.)

(Testimony of Patrick Mooney.)

Mr. Campbell: I suggest this was result of discussion with a Mr. Maundrell; further it is not within the scope of direct examination; further it is incompetent and immaterial.

The Court: It is not proper cross-examination. Objection sustained.

Mr. Gillen: In connection with Mr. Maundrell, he will be a witness for the government. He has been here from Honolulu, I don't know how long, waiting to appear.

Mr. Campbell: We ask that the jury be instructed to disregard the remarks of counsel.

The Court: The ruling will stand.

Mr. Gillen: Without disregarding, of course, your Honor's ruling, I would like to obtain from Mr. Mooney, and have marked for identification, the particular document I asked for.

The Court: You may do so.

Q. Do you have, Mr. Mooney, a copy of the proposed statement to go with an amended partnership return for the Menlo Club for the year 1945?

A. I believe I have it in the files.

Q. May I show him a photostat—the original of that, Mr. Mooney? While we are looking for that, Mr. Mooney, do you mind if I ask you what is your age, please?

A. I was 81 the 17th of March, 1951. I was born in 1870. [448]

Mr. Gillen: I will ask that this be marked for identification. I take it your Honor is directing

(Testimony of Patrick Mooney.)
me not to pursue the examination on that point
any farther?

The Court: Yes.

Mr. Gillen: Very well.

Q. Mr. Mooney, it was part of the duties of every member of the collector's office, not only for the District of Nevada, but everywhere in the United States, to assist any taxpayer who appealed to them in making out, or to make out with them, their returns?

A. Assistance—it is called assisting the taxpayer.

Mr. Gillen: I am going to ask Mr. Campbell, through the Court, your Honor, whether or not he will stipulate he now recalls there was an amended return for the year 1944 made out in pencil in Mr. Mooney's handwriting for Elmer Remmer, as well as the pencilled return that we filed, or copy which we filed as exhibit for the defense.

Mr. Campbell: I ask an opportunity to check that over the evening recess to make sure such a return was filed.

Mr. Gillen: I understood you to say that you did recollect it.

Mr. Campbell: I have some recollection of an amended return, but I want to make sure that is correct. I will be prepared the first thing in the morning.

Mr. Gillen: With regard to Defendant's Exhibit I for [449] identification, may it please the Court,

(Testimony of Patrick Mooney.)

I would like to ask one question to lay a foundation for introduction of this exhibit at some later time in evidence.

Mr. Campbell: Is this as Mr. Gillen's witness?

The Court: He is going to ask a question for the purpose of identification is all and we will hear the question.

Q. My question is, Mr. Mooney, referring to Defendant's Exhibit I for identification, a communication or statement you prepared for Mr. Maundrell to be attached to amended return of the Menlo Club, did you deliver or mail this to Mr. Maundrell?

Mr. Campbell: May that be answered yes or no?

The Court: Yes.

A. I may have delivered it to him.

Q. I am not seeking necessarily the form in which it came to his attention, but to your knowledge did this proposed statement ever come to his attention, was it brought to his attention by you or in any other manner?

A. Yes, it was brought to his attention.

Mr. Gillen: I think that is all. We are happy to excuse Mr. Mooney, with the understanding he may be on call.

The Court: Counsel may have some more questions.

Mr. Campbell: No, that is all.

(Witness excused.) [450]

Mr. Campbell: I wonder if the defense is ready

to proceed with completing cross-examination of Mr. Billington that the government is keeping here at their request?

The Court: How about that, Mr. Gillen? Have you any more cross-examination of Mr. Billington?

Mr. Avakian: Your Honor, in regard to the cross-examination of Mr. Billington, the defense is unable to complete that cross-examination without having access to the records of the prosecution. May we suggest he be excused and go back to his business, subject to recall on reasonable notice?

The Court: Is that satisfactory?

Mr. Campbell: Yes.

The Court: Mr. Billington, you may be excused, subject to call on a few days' notice.

(Jury and alternate jurors admonished and recess taken at 3:50 p.m.) [451]

Friday, December 7, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

HOMER H. FORRESTER

having been previously sworn, was recalled on behalf of the plaintiff and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Mr. Forrester, you have already testified to your position with the Collector's office with the District of Nevada, have you not? A. I have.

(Testimony of Homer H. Forrester.)

Q. And since your appearance in court to testify in this trial some few days ago, have you personally examined the records of the office of the Collector of Internal Revenue for the District of Nevada for the purpose of determining what income tax returns have been filed since the year 1934 for and on behalf of Elmer Remmer and his wife, Helen L. Remmer? A. I have.

Mr. Gillen: Objected to as asked and answered, was gone into both on direct and cross-examination.

The Court: Objection overruled. The answer may stand.

Q. And as a result of that search, Mr. Forrester, what did you discover in the way of a record of any return having been filed by Elmer L. Remmer, that is, a federal income tax return for the years from 1934 to 1942, inclusive? [452]

Mr. Gillen: Objected to as asked and answered, gone into both on direct and cross-examination previously.

The Court: Read the question.

(Question read.)

Mr. Thompson: My first question referred to search the witness personally made since his first appearance.

The Court: Of course, it assumes that he did discover something. The form of the question might be objectionable.

Q. According to the records and entries in the office of the Internal Revenue for the District of

(Testimony of Homer H. Forrester.)

Nevada, what federal income tax returns have been filed by Elmer Remmer since 1934 to and including 1946?

Mr. Gillen: Objected to as calling for opinion and conclusion. Income tax returns can be filed in any collector's office in the United States. I think he can say what he personally found or did not find.

The Court: I thought that was the purpose of this examination, to determine whether or not he found some returns since the last time he was on the stand, so you may answer the question.

(Question read.)

A. A delinquent 1934 return was filed during the calendar year 1937. I could find no returns for the period 1935 through 1941. Returns were filed for the period 1942 through 1946. [453]

Q. And what is the situation with regard to record or entry of any returns for Helen L. Remmer during the same period?

Mr. Gillen: Objected to as leading and suggestive, assuming something not in evidence.

The Court: Objection overruled. You may answer the question.

A. Returns were also filed for Helen L. Remmer for the same years that returns for Elmer Remmer were filed.

Q. And have you found any returns for either Helen Remmer or Elmer Remmer other than those that you have heretofore produced before this court?

(Testimony of Homer H. Forrester.)

Mr. Gillen: Same objection, asked and answered, gone into on direct and cross-examination on the first appearance of this witness. He is asking these questions just to impress—

The Court: Objection overruled. Read the question.

(Question read.)

A. No, except for the years that I have mentioned.

The Court: I don't understand the answer.

(Question and answer read.)

The Court: That doesn't mean much to me.

Q. What do you mean, "except for the years that have been mentioned"?

A. Well, I have found returns subsequent to 1946.

Q. But referring to the period of 1934 to 1946, the ones you have produced are the only ones you have found? [454] A. That's right.

Q. Now, Mr. Forrester, I would like to show you Defendant's E for identification, which has written at the top "Amended Return" on form 1040, for the calendar year 1944, in the name of Helen L. Remmer, and ask you whether an amended return for the year 1944 in that form, or in any form, was filed with the Collector of Internal Revenue for the District of Nevada?

A. No, it wasn't.

Mr. Gillen: I move that the question and answer be stricken, may it please the Court, assuming

(Testimony of Homer H. Forrester.)
something not in evidence and calling for conclusion. I think the proper form of the question would be if he found any record of such a record.

The Court: Read the question.

(Question read.)

The Court: Objection will be overruled. The answer may stand.

Q. And Mr. Forrester, was any return filed in form similar to Defendant's Exhibit E for identification, that is an amended return, for the calendar year 1944 for Elmer Remmer?

Mr. Gillen: Objected to as calling for opinion and conclusion of the witness and I suggest again the proper form of the question would be, did he find any.

The Court: You referred to the District of Nevada in that question?

Mr. Thompson: Yes, your Honor. [455]

The Court: Objection will be overruled. You may answer the question.

A. No.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Forrester, it is true, is it not, that a taxpayer might file a return in any collector's office in the United States, is that correct?

A. It is, with the exception that the law provides it should be filed in the district in which the

(Testimony of Homer H. Forrester.)

taxpayer maintains his residence or personal place of business.

Q. Well, as a matter of fact, the form itself asks what collector's office you filed your last return, isn't that so, in the lower left-hand corner of the form? A. That's right, yes.

Q. Now, when a tax return is made, what is the machinery for keeping track of what return has been made on that tax return, that is, what credit should be given and what delinquency, if any, should be noted?

A. You are talking about what years?

Q. I am talking about any year of any taxpayer. What is the machinery of your office?

A. Well, we set up an assessment list, showing the tax assessed and the payments made thereon.

Q. And the tax assessed, of course, noted as an assessment, is [456] from the return as made by the taxpayer, is that correct? A. That is correct.

Q. And so if the taxpayer said, for example, the tax was fourteen thousand dollars for he and his wife, it would be assessed at that on your assessment roll? A. Yes.

Q. Then there would be some note made as to what payment was made on the 14 thousand dollars assessment? A. That is right.

Q. And if the taxpayer made his complete payment, it would be a washout item, he would be given full credit for the assessment, there would be nothing against him? A. Correct.

Q. On the other hand, if he did not make full

(Testimony of Homer H. Forrester.)

payment, it would be noted what he still owed as the balance on that assessment? A. Correct.

Q. Then if he made a payment at some later time on that delinquency, of course that would be noted, he would be given credit for whatever payment he made? A. Yes.

Q. Now, I will ask you to look at the prosecution's Exhibits 3 and 4—and with the permission of the Court I will hand these exhibits to the witness—and tell us what tax return was made by Elmer Remmer and Helen Remmer for that year, which I believe [457] is for the year 1945.

A. That is the total tax shown on the return?

Q. Yes.

A. The 1945 return for Helen L. Remmer shows tax of \$14,074.29.

Q. That is what Helen L. Remmer owed?

A. Correct; and Elmer Remmer owed \$13,072.02.

Q. That is what Elmer Remmer owed?

A. Correct.

Q. The difference in the figures of those might be difference in the deductions, is that correct?

A. It could have, yes.

Q. Now, I will ask you to look at plaintiff's Exhibits 13 and 14, which I will remind you are certificate of assessment and payments which you introduced on your last appearance here, according to the district attorney what the books of your office show against Helen Remmer and Elmer Remmer, and ask you what was paid by the two taxpay-

(Testimony of Homer H. Forrester.)

ers on that 1945 return, as reflected on your transcript there?

A. Helen L. Remmer made a payment of \$7724.11 on August 1, 1946. On September 3, 1946, a payment of \$2,662.02 was made. During the year 1945 she paid \$2500 on her declaration of estimated tax.

Q. That was for the next year?

A. No, it was for that year, 1945.

Q. I see, all right. Now, what was the total amount that Helen [458] Remmer paid on that 1945 return? A. Total \$12,886.13.

Q. And she owed 14 thousand how much?

A. \$14,074.29.

Q. Would you be kind enough to give us the differential? A. \$1,188.16.

Q. Now, would you be kind enough to give us what was paid on Elmer Remmer's tax for that year and give us the difference, if the full amount was not paid?

A. A payment on April 4, 1946, in the amount of \$7,000. A payment was made on September 3, 1946, in amount of \$2,662.05. A payment had been made on August 19, 1945, of \$2500 on declaration of estimated tax. The total payments made were \$12,162.05. The tax shown on the return, \$13,072.02, would leave a difference of \$909.97.

Q. So, on Mrs. Remmer's tax, there was something in excess of a thousand dollars owing, that is, \$1,188.16 due on Mrs. Remmer's tax for that year, and \$909.97 on Mr. Remmer's tax, is that cor-

(Testimony of Homer H. Forrester.)
rect? A. Did you say due?

Q. Unpaid, according to the figures that you gave us there.

A. No, it would show that they were overpaid by that amount.

Q. That they were overpaid by that amount? I thought you said Mrs. Remmer owed a tax of \$14,074.29 and had only paid a total, including the estimate, of \$12,886.13, leaving an unpaid balance [459] of \$1,188.16, isn't that correct?

Mr. Campbell: That is objected to as stating something not in evidence. The question of the witness was what was shown on the face of the return.

Mr. Gillen: All right; he said it was so placed on the assessment roll, as I understood, the return was accepted and placed on the assessment roll and that is the amount that was collected on.

The Court: That is what I thought.

Mr. Campbell: That is not my understanding, your Honor.

The Court: Objection will be overruled. You may answer the question.

Q. Do you have the question in mind, Mr. Forrester?

A. I am sorry; it would show that amount due.

Q. And for Mr. Remmer your figures that you gave us was a return which was placed on the assessment roll, I presume, showing that Mr. Remmer owed \$13,072.02 and that he paid a total of \$12,162.05, leaving a balance due of \$909.97, is that correct? A. That is correct.

(Testimony of Homer H. Forrester.)

Q. When there is a balance due on a tax such as indicated here, what is the machinery of your office with regard to collecting that balance due? What do you do about it?

A. Well, we send the taxpayer's notice and demand for the payment of the tax.

Q. Do your office records reflect that such was done here? [460] A. I couldn't say.

Q. Now, another thing can happen, can it not, with regard to a balance reflected on the books. For example, an amended return can be made, showing that there was a full payment or an overpayment, isn't that true?

A. I don't exactly get the question.

Q. Perhaps I am not making myself clear. For example, one of the things that could happen on your books would be the filing, for example, in Mr. Remmer's case, of an amended return, showing that the tax originally figured was too high and that he may have overpaid and had a credit due him; that could happen, isn't that so? A. That is true.

Q. And it could be also that a credit could be reflected for a prior year, isn't that true, by reason of an overpayment of a prior year?

A. By filing an amended return.

Q. Yes, or an audit, showing there had been overpayment for the prior year, is that correct?

A. Yes.

Q. Now, if an overpayment for a prior year were revealed and for a subsequent year there was a balance due your office, would you offset that, that

(Testimony of Homer H. Forrester.)
is, give the taxpayer the credit for any overpayment, is that true? A. That is right. [461]

Q. What occurred in this case, with reference to the reflected payments here showing a \$909.97 balance due from Mr. Remmer and \$1188.16 due from Mrs. Remmer? Was there ever a notice sent to these taxpayers on that?

A. I couldn't state whether there was or not.

Q. Was the money ever collected, those balances?

A. It appears not from the certification.

Q. Was there ever a credit given which offset those balances?

A. I couldn't state without the assessment list just what was done with the balance.

Q. Well, somebody looked at the assessment list and you prepared these documents that form the prosecution's Exhibits 13 and 14, isn't that true?

A. Correct.

Q. And according to your assessment list those balances were just left up in the air, nothing ever done about them, isn't that true? I say according to the list. A. According to the list, yes.

Q. And you wouldn't say, as a deputy collector, that that was the fact, that nobody ever did anything about sending out any notices trying to collect that money, would you? A. No.

Q. So there is something wrong about that, isn't there? A. Yes.

Q. And you are not prepared now to say what the assessment [462] list reflects with regard to any

(Testimony of Homer H. Forrester.)

credits and payments, except what you have shown us here and what was prepared and brought in here as an exhibit? A. Right.

Q. Are returns ever misplaced or lost in your office? A. Not to my knowledge.

Q. Has there ever been an instance of a return or an amended return going astray in your office?

A. Not to my knowledge.

Q. How many of these returns do you handle in this District of Nevada?

A. Amended returns or regular returns?

Q. All kinds of returns, all income tax returns, what is the approximate total?

A. Well, during 1945 I would say roughly forty to fifty thousand.

Q. And has that number increased since that time?

A. It has increased since that time.

Q. So it was between forty to fifty thousand in 1945, is that correct?

A. That would be my guess, yes.

Q. And it is your testimony that to your knowledge nothing ever went astray out of 40 to 50 thousand returns that were made?

A. To my knowledge. [463]

Q. But you do observe, from the exhibits and from the returns that you hold in your hand, all of which are prosecution's exhibits, that there is something that went astray in regard to the balance that is shown on those two returns?

A. Yes. I notice this claim six thousand dol-

(Testimony of Homer H. Forrester.)

lars; both claim six thousand dollars payment on their estimated tax, whereas they only paid \$2500.

Q. So something is astray right at that point?

A. That has been adjusted though.

Q. How has it been adjusted?

A. By an additional assessment of \$3500.

Q. Where does that show?

A. On the upper left-hand corner of the return.

Q. Well, if that was done, it would put us in the position we were before, isn't that correct, that there is still something wrong about the balance?

A. It would be.

Q. Now, I am going to show you, with the Court's permission, Mr. Forrester, defendant's Exhibit E for identification, which I believe has been mentioned as a purported amended return for Helen Remmer for the year 1944. Mr. Forrester, if a return was made with a remittance by check or cash, if the return went astray, would the remittance be reflected as a credit on your assessment?

A. It would. [464]

Q. So that it is possible that an amended return could go astray but still since the money to take up the balance did come into your hands, it would be properly deposited and noted and reflected as a credit for the benefit of the taxpayer on your assessment roll, is that correct? A. Correct.

Q. How long are returns kept in your office, Mr. Forrester?

A. Well, there are two classifications of returns. The collector's returns are retained for a period of

(Testimony of Homer H. Forrester.)

six years from the date they are filed. The agent's or Bureau's returns are retained for a longer period of time.

Q. So that anything that was filed before the year 1942 in the way of a return would no doubt have been destroyed by your office, is that correct?

A. That is correct.

Q. And so, when you stated that you found no returns between 1934 and 1941, where did you get that information?

A. From the assessment list.

Q. The assessment list doesn't show a return; it shows only what is chargeable to the taxpayer and what credit is given, is that so?

A. Correct.

Q. And so, whether or not a return ever existed for those years, you are unable to say now?

A. I can say, return was not and income tax due was not filed. [465] If a non-taxable return was filed, it wouldn't show on our assessment list.

Q. So the fact of the matter is this, that if I, prior to those years manifested, had filed with your office—this is by way of illustration—had filed with your office a tax return, showing no tax due by reason of lack of income or by reason of proper deductions, it would not show on your assessment roll, is that correct?

A. Correct.

Q. And at this date the actual return showing no tax due from me would have been destroyed, is that correct?

A. If it was a collector's return.

(Testimony of Homer H. Forrester.)

Q. Collector's return prior to six years to this date, or April, 1942? A. Correct.

Q. And so there would be no record of whether I ever filed a return that year or not?

A. Ordinarily there would be an index record. In other words, we prepare index cards when the return is filed, which we file in alphabetical order, of all returns filed, including the taxable and the non-taxable.

Q. You say ordinarily; what do you mean by ordinarily?

A. I say we do prepare those index cards.

Q. You used the term "ordinarily"; do you mean sometimes it is not done? [466]

A. No, it is always done.

Q. Now, if you had income tax return for the year 1934, showing taxable return filed, and then in the intervening years there was no tax due, what would be the situation in that instance?

Q. There would be index cards for all the returns for those years.

Q. Now, did you search those index cards?

A. No.

Q. You did not?

A. They were destroyed in the flood we had in 1950. We had the prior index cards stored in our basement. That was the reason that search was made through the assessment list.

Q. So that whatever records you may have had of any taxpayer's returns, whether taxable or non-

(Testimony of Homer H. Forrester.)

taxable, for a period of time prior to 1942 have been destroyed?

A. No, the assessment lists are still in our possession.

Q. I mean with reference to the indexes.

A. The index cards for those years—

Q. What years were covered—

Mr. Campbell: He hadn't finished his answer.

Mr. Gillen: I am sorry.

(Question and answer read.)

Mr. Gillen: Maybe I can reframe the question.

Q. It is my understanding of your testimony, Mr. Forrester, that between the years 1934 and 1942 that you still have a [467] record in your office of any taxable returns that were made, is that correct? A. Correct.

Q. As to non-taxable returns, you have no record, by reason of the fact, first of all, that non-taxable returns do not appear on the assessment roll, and by reason of the fact that, due to this act of God that you mentioned, your index cards were destroyed? A. Correct.

Q. The cards were destroyed for what period of time, Mr. Forrester?

A. The index cards prior to 1942, including 1942 and prior.

Q. Were destroyed? A. Right.

Q. In your storage room in the basement of the building, is that correct? A. Yes.

Q. So that at this moment you can not say now

(Testimony of Homer H. Forrester.)

whether or not there was any record, by way of index card, showing the filing of non-taxable returns by Elmer Remmer and his wife, Helen Remmer? A. That's right.

Mr. Gillen: I think that is all.

(Witness excused.) [468]

WILLIAM GREENHOUSE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

- Q. Will you state your name, please?
- A. William Greenhouse.
- Q. Where do you live?
- A. Lawrence, Long Island.
- Q. That is in New York State? A. Yes.
- Q. What is your business?
- A. Custom tailors; 18 East 53rd Street, New York.
- Q. What is the name of your firm?
- A. Corrado-Greenhouse, Inc.
- Q. What is your position with that company?
- A. I am president of the company.
- Q. How long have you been an officer of Corrado-Greenhouse?
- A. Since its inception, about 17 years ago.
- Q. You have been president of the company continuously through that time? A. Yes.

(Testimony of William Greenhouse.)

Q. What is the nature of your business?

A. Men's custom tailors; everything made to measure. The price today is \$235 a suit.

Q. Have you brought with you the original ledgers of Corrado-Greenhouse relating to account of Elmer Remmer? [469]

A. I brought the original cash books and have made a record from them.

Mr. Thompson: Your Honor, I have a record here covering the years 1944, 1945 and 1946 for account of Elmer Remmer with Corrado-Greenhouse, which has been marked plaintiff's Exhibit 71 for identification.

Mr. Gillen: The defense is prepared to stipulate that this may be offered in evidence, subject to whatever explanation we may require in the way of cross-examination.

The Court: Very well.

Mr. Thompson: We offer it in evidence, your Honor, Exhibit 71.

The Court: They are understood to be records kept in the regular course of business?

Mr. Thompson: Yes, your Honor, the witness has produced his original ledger books. He has made a transcript of them.

The Court: I didn't hear any testimony in regard to it. I just want to know if counsel will stipulate that?

Mr. Gillen: Yes, your Honor.

Q. Mr. Greenhouse, I show you plaintiff's Exhibit 71. Will you state the total of the payments

(Testimony of William Greenhouse.)

which were made Carrado-Greenhouse by Mr. Elmer Remmer during the year 1944? A. \$1542.00.

Q. And what were those payments for? [470]

A. Those payments were for clothes.

Q. Do you know Mr. Remmer personally?

A. Yes, sir.

Q. And have you personally waited on him?

A. Yes, sir.

Q. Fitted him?

A. Well, I don't do the fitting. Mr. Carrodo does the fitting and I wouldn't be the only one who sold. There are others besides, but I sold him on several occasions.

Q. Referring to the year 1945, what is the total amount which Mr. Elmer Remmer paid Carrodo-Greenhouse during that year?

A. Five hundred dollars.

Q. What were those payments for?

A. Also for clothes.

Q. During the year 1946 what is the total amount of payments made by Mr. Elmer Remmer to Carrodo-Greenhouse?

A. Six hundred three dollars.

Q. What were those payments for?

A. For clothes.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Greenhouse, in the transcript that you prepared for the accommodation of the prosecu-

(Testimony of William Greenhouse.)

tion here, there is a third sheet there that appears to be a duplicate of one of the other sheets, is that so? [471] A. Yes, sir.

Mr. Campbell: That is the one with the clerk's stamp on it.

Mr. Gillen: I think the sheet in duplication should be withdrawn.

Mr. Campbell: Then why not substitute this for the other?

Mr. Gillen: Whatever way, as long as it is not a duplication. I think we should remove the third sheet, may it please the Court, and leave the transcript showing the other two sheets for each year.

Mr. Thompson: We have no objections, your Honor, if the clerk's stamp may be placed on the exhibit as Exhibit 71.

The Court: Very well.

Mr. Gillen: No cross-examination.

Witness excused.

CHRIS R. WEISZ

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

- Q. Will you state your name, please?
- A. Chris R. Weisz.
- Q. Where do you reside?
- A. 1614 30th Avenue, San Francisco.

(Testimony of Chris R. Weisz.)

Q. What is your business? [472]

A. Deputy collector in the San Francisco office of the Internal Revenue.

Q. How long have you been a deputy collector in the San Francisco office?

A. Since December 7, 1942.

Q. In other words, for a period of nine years, is that correct? A. Nine years.

Q. And to what particular part of the collector's office are you assigned?

A. Well, the regular duties of a deputy collector.

Q. No, are you attached to any particular division of the collector's office?

A. At the present time with the cabaret and admissions tax division.

Q. As a deputy collector, do you have access to the official files and records of the collector of internal revenue for the First Collection District of California? A. Yes.

Q. And as a deputy collector, have you been designated as the official to produce here certain records of the collector's office? A. I have.

Q. And did you personally secure those records?

A. I did.

Q. You have been asked to produce here certain returns, (1) [473] relative to a partnership known as the 21 Club. I will ask you if you have the partnership return for 1944 of the 21 Club?

A. I do.

Q. Will you produce that?

(Testimony of Chris R. Weisz.)

Mr. Campbell: May this be marked for identification?

The Court: No. 72.

Mr. Campbell: May I state, your Honor, this witness will produce a number of returns, so for the sake of time, and if counsel will agree, may I have him produce them seriatum and they can be examined all at one time.

The Court: I think so.

Q. Have you also produced the partnership return, also for the year 1944, of that same 21 Club?

A. I have.

Mr. Campbell: I will ask to have this marked plaintiff's 72A for identification.

The Court: What was 72?

Mr. Campbell: No. 72 is partnership return of the 21 Club for a portion of the period 1944, while 72A purports to be of the entire year 1944.

Q. Have you also produced here a partnership return purporting to be a combined return for the 21 Club and the San Diego Social Club for the year 1946? A. I have.

Q. Will you produce that? [474]

Mr. Campbell: May this be marked 73 for identification?

Q. Now, have you also produced here the 1944 partnership return of the 311 Club? A. Yes.

Q. And do you have the 1945 partnership return for that organization? A. Yes.

Q. And the 1946 return for the 311 Club?

A. I do.

(Testimony of Chris R. Weisz.)

Mr. Campbell: I will ask that the 1944 return be marked 74 for identification, the 1945 return be marked 75 for identification, and the 1946 return be marked 76 for identification.

Q. Mr. Weisz, in regard to the B & R Smoke Shoppe, have you produced here the 1943 partnership return? A. I have.

Q. Have you also produced the 1944 partnership return? A. I have.

Mr. Campbell: The 1943 partnership return I will ask to have marked 77 for identification and the 1944 return 78 for identification.

Q. Mr. Weisz, did you personally make an examination and search for the purpose of determining whether or not a 1945 partnership return was filed for the B & R Smoke Shoppe?

A. I did.

Q. What did such search disclose? [475]

A. No record.

Q. No record of any being filed?

A. No record of any being filed.

Q. Have you produced here the 1946 partnership return of the B & R Smoke Shoppe?

A. I have.

Mr. Campbell: I will ask to have this marked 79 for identification.

Q. Mr. Weisz, in regard to a partnership known as the 110 Eddy Street, I will ask if you have produced here the 1943, 1944, 1945 and 1946 partnership returns? A. I have.

Q. May I have them?

(Testimony of Chris R. Weisz.)

Mr. Campbell: I will ask the 1943 partnership return of 110 Eddy Street be marked 80 for identification, the 1944 be marked 81 for identification, the 1945 be marked 82 for identification, and 1946 be marked 83 for identification.

Q. Mr. Weisz, with regard to the partnership known as Day-Night Cigar Store, I will ask you if you have produced here the 1944, 1945, and 1946 partnership returns? A. I have.

Q. Will you produce those?

Mr. Campbell: I ask the 1944 partnership return of the Day-Night Cigar Store be marked 84 for identification, the 1945 return be marked 85 for identification, and the 1946 return be [476] marked 86 for identification.

The Court: Counsel requested a conference. Would it be as well to have it at this time?

Mr. Gillen: May I suggest, unless there is a great many more, if we got all these before recess we could examine them.

The Court: Very well, go ahead.

Q. With regard to 186 Club, a corporation, I will ask you if you have produced here, with regard to the fiscal year 1944, the tentative and original returns for that year? A. I have.

Q. And have you also produced the tentative and original returns for the fiscal year 1945?

A. I have.

Mr. Campbell: I will ask that the tentative return of the 186 Club for the fiscal year ending June 30, 1944, be marked 87 for identification and that the original return of the 186 Club for the

(Testimony of Chris R. Weisz.)

same period be marked 87A, final return, I should say. I will ask that the tentative return for the period ending June 30, 1945, of the 186 Club be marked 88 for identification and that the final return be marked 88A for identification.

Q. Mr. Weisz, did you personally make a search to determine whether or not an income and excess profits tax return, or either, were filed for the 186 Club for the fiscal year ending June 30, 1946? [477]

A. Yes.

Q. And what did such search disclose?

A. No record.

Q. With regard to the Menlo Club, a partnership, I will ask you if you have produced here the 1945 partnership return, the 1946 partnership return, and the 1946 amended partnership return of the Menlo Club? A. I have.

Q. Will you produce them?

Mr. Campbell: I will ask that the 1945 partnership return of the Menlo Club be marked government's 89 for identification, that the 1946 return be marked government's exhibit 90 for identification, and that the 1946 amended return be marked 91 for identification.

Q. Mr. Weisz, I will ask you also if you have produced here the 1946 partnership return of the Transit Smoke Shop, a partnership?

A. I have.

Q. Will you produce that?

Mr. Campbell: I will ask that this partnership return for 1946 for the period November 1st to De-

(Testimony of Chris R. Weisz.)

ember 31st, 1946, be marked government's 92 for identification. That is the final one to be marked, your Honor.

(Jury and alternate jurors admonished and excused at 11:10 a.m.) [478]

In Chambers—11:15 A.M.

(Defendant not present.)

(All attorneys present.)

Mr. Golden: I would like the record to show that all counsel are here in chambers and we waive the presence of the defendant.

Mr. Pike: May I say this, there is a provision in one of the federal rules that the defendant shall be present at all proceedings of the trial. Now, if this is something that requires the attendance of the defendant, I do not want any error in the record for non-compliance with that rule, and I would like to refer to Federal Rules of Criminal Procedure—

The Court: If this is part of our regular court procedure, a matter which belongs to and is a part of the trial of this case, it is going to be in open court and the public invited. I have just this thought, I do not see why we should have to have part of court sessions in chambers and the public barred. These trials are supposed to be public.

Mr. Golden: That is all right, let us have the jury there then.

The Court: If you want them there. It all de-

pends. I want to see what the statement is for before it goes to the jury.

Mr. Golden: Well, as to the matter of the defendant, I [479] said I would waive the presence of the defendant.

Mr. Gillen: Our only thought is, if the matter is taken up in the presence of the jury, they will hear actually what takes place; if it is taken up out of their hearing, they get a garbled account of what occurred if they happen to read the papers and that is what we want to guard against. Sometimes you read these reports in the paper and wonder if they are reporting the same trial you are conducting.

The Court: I want to let in the light of day on all our affairs. I do not mean to say counsel does not feel the same way, but I do not want to put myself in any case in a position for criticism that we have star chamber sessions in our court trials.

Mr. Golden: It would not be star chamber session if counsel on both sides were present.

Mr. Gillen: It will be in the record.

The Court: So if there is any statement made, we will have it in open court in the absence of the jury. I thought it was to be a conference for something but if it is going to constitute a part of the procedure in this trial and be something going into the record, constituting a portion of the record of the trial, we can not have it here.

Mr. Golden: When we shall have it?

The Court: We can have it right now in open court. [480]

11:20 A.M.

(In the absence of the jury.)

The Court: Court will be in session. Let the record show the presence of the defendant with counsel.

Mr. Golden: If the Court please, the defense requests permission to advise your Honor of its position in regard to the matters yesterday in connection with the subpoena served upon Mr. Semenza for the production of certain material.

There are three different categories, your Honor, into which the material called for by that subpoena falls. The first category is the matter of the three checks in connection with the testimony of Mr. Mooney which, as your Honor will recall, are apparently somewhere that neither side knows, and the photostats from the Examiner newspaper were produced by us and accepted by everybody as substitutes, so we can consider that that part of the subpoena is finished. That is correct, is it not?

Mr. Campbell: That is correct.

Mr. Golden: Now, the other two remaining groups consist, in the first place, of the books of account and other records pertaining to the Cal-Neva corporation. As to that group of records and material, we do not claim any legal privileges, that is to say, we agree that when properly subpoenaed they are available to the party issuing the subpoena, and although they were not in the possession of Mr. Semenza at the time that they were subpoenaed, we are willing to produce them at the [481]

request of the prosecution. We urgently and sincerely suggest, however, that they be produced in such a way that we will have equal access to them and convenient access to them during the course of this trial, and your Honor, of course, is aware of the physical difficulties—most of counsel on both sides are living in Reno and I do not think it is necessary to go into detail of the physical difficulties there at the moment.

The Court: That is a matter I wish you would take up with Congress, so we can have a courthouse built in Reno.

Mr. Golden: In connection with those records, the Cal-Neva corporate records, your Honor, we are today, the defendant's staff are today, going through the material and getting those out and we can make them available by Monday, providing we can work out some way that they don't have to be taken back and forth every day and some way that both sides can look at them when court is not in session.

Now, the remaining group consists of records which Mr. Campbell himself has stated yesterday in court, are the property of the defendant, in that the government contends that he was a partner or part owner, or perhaps in some cases sole owner, of the enterprises of which they are records. As to those, if the Court please, Mr. Campbell himself stated yesterday—this is on page 408 of the transcript—that it would be highly improper to subpoena them in the hands of the defendant's attorneys. [482] Without going into detail, we submit

that the Court's order to us to produce the same is not sanctioned by law, is contrary to the law and is unfair and unjust to the defendant and deprives him of the rights guaranteed him by law and the Constitution. We, of course, have no intention of defying the Court and if the Court, notwithstanding our position, wants their production, that production will be made. At the same time today people are going through the records over there to get out what was called for by the subpoena, which is in this last group of material, namely, concerning the enterprises in which the government says the defendant is part or sole owner. All the material over there is mixed up with our own work sheets and our own memoranda and it is going to take a little time to get things separated. There is, I might say, in volume a considerable mass of material, probably fill a couple of large packing cases.

Now, in connection with that material also, we would like the record to show that it is necessary for us to refer to it daily and that it will hamper us if the material remains on deposit here with the clerk, whose official offices are such and whose location, compared with the temporary residences of counsel is such, that it makes it very difficult to get at the material.

Furthermore, if the Court please, while we are not prepared today to go into detail as to the legal reasons why it [483] would be error—and I say that respectfully—error and prejudicial error to enforce the Court's order of yesterday, we do feel that there are authorities as to court decisions on the subject

and would like permission to present the same on Monday, in other words, giving us the week end as opportunity to assemble.

So I say we make this statement for the purpose of clarifying the record and we want the record to be very clear, your Honor, that as to the non-corporate records covered by the subpoena which was served on Mr. Semenza, if we produce them in accordance with the Court's order, which we will do if that order stands, that we are producing them only in accordance with the Court's order and under respectful protest and only because of the Court's order and insisting all along that not only would we be deprived practically of the means of preparing our defense, that is, for the purpose of consulting those matters during the trial, but also legally the Court's order is entirely without due sanction of law.

The Court: Well, we may have some interesting legal questions raised here and questions which should be carefully considered by the Court and will be carefully considered by the Court.

Getting back to the situation yesterday, we had Mr. Semenza testify here he received these records which we have in mind here now, from a Mr. [484] Weaver and there was a receipt or something to the effect that would indicate that the records were to be returned to Mr. Weaver, isn't that so?

Mr. Golden: That is correct, your Honor; yes.

The Court: So the agent, you might say, of this defendant, Mr. Semenza, obtained these records from the Internal Revenue Department on a prom-

ise to return to the Internal Revenue Department.

Mr. Golden: Your Honor starts in the middle, if I may say so respectfully.

The Court: That is the part I first heard and that is a good place to start from. Now that is it. Mr. Semenza received these from Mr. Weaver of the Internal Revenue Department on promise to return them. What did he do? Turned them over to some other agent of the defendant, a Mr. Friedman, and then to counsel, and they are still in the hands of counsel. They have never been returned to the Internal Revenue office, which is where they belong. I made that order yesterday and you have two hours to comply with it, I think— $2\frac{1}{2}$ hours—and I want those records here or at this clerk's office at two o'clock. Then when we get the records over here, we will come to your legal points on the question of whether or not they should be admitted in evidence. [485]

Mr. Golden: Now, your Honor, we have no objection—

The Court (Interceding): Now, when this came up yesterday I wondered if my order was a little bit out of line, but after being informed of these matters, the questions of law in regard to these partnership records, they go to the question of whether or not any of these records are admissible in evidence, but still the situation appears to me to be this, that the defendant obtained the records for inspection purposes on a promise to return them and did not return them. Now I want them returned.

Mr. Golden: So did the government, your Honor; they obtained them—

The Court (Interceding): I am talking about the defendant.

Mr. Golden: We are talking about the government. There are two parties here.

The Court: Then after this situation was opened up and we found there was a question as to whether or not they would be legally admissible, Mr. Campbell stated yesterday that this order be made, isn't that correct?

Mr. Campbell: Yes, your Honor; that they be delivered to the clerk. [486]

The Court: There is no chance for the defendant being deprived of any constitutional privilege by having those records deposited with the clerk.

Mr. Golden: Well, your Honor, we have no objection to deferring the legal argument as to what is to happen to them until they are deposited here, if that is the Court's order.

The Court: I made the order and from your remarks here I took it that you did not intend to comply with it. You were talking about somebody going through the records and examining them. I want that order complied with. At two o'clock I want these records here.

Mr. Golden: Your Honor, as a practical matter I stated yesterday, and I am going to state today under oath that those records are physically mixed up with other matter not called for by the subpoena, not admissible in evidence, our own memoranda and so on, and it may take a little further time—

The Court (Interceding): Yesterday I let you fix your own time. I suggested 10:00 o'clock and then on the suggestion of counsel made it two o'clock. Here is my position. I don't want to appear to be severe. I am not severe, I do not think I am, but I just don't want to be pushed around by any one, in court or out. Now, I made an order and I expect it to be complied with. [487]

Mr. Golden: Of course, your Honor, we couldn't get there and back.

The Court: Well, you had all night to get them and all day yesterday.

Mr. Golden: I would like—

The Court (Interceding): What do you think I meant when I said two o'clock yesterday afternoon? What did you think I meant?

Mr. Golden: I thought when I told your Honor—

The Court: Why didn't you tell me at that time?

Mr. Golden: Because I didn't know, your Honor. I thought when we explained the practical difficulties, it wouldn't be a matter and that order of two o'clock wouldn't be any particular significance and we could have, if your Honor will put it that way, an extension.

The Court: Well, we have to get an understanding some time or other. It could very well happen what I said yesterday had no significance and what I say today would likewise have no significance.

Mr. Golden: I think your Honor is—

The Court (Interceding): I just don't like the idea of any one obtaining records from any person or governmental agency or from an individual on a promise to return and then have them scattered around the country and not returned. [488]

Mr. Golden: I say this respectfully, I think your Honor is unduly apprehensive about pushing the Court around.

The Court: Let us not go into any outside matters. I want the records here at two o'clock.

Mr. Golden: Will it be understood they will remain sealed until such time—

The Court (Interceding): They will be brought and left in the custody of the clerk and they will not be sealed. They were not sealed when taken out by Mr. Semenza.

Mr. Golden: You see what is happening. The prosecution, over the week end, is going through them before we have a chance.

The Court: I don't know whether they will or not.

Mr. Golden: They will.

The Court: They would have had opportunity to look through them if Mr. Semenza had returned them to the revenue office.

Mr. Glidden: Of course, as Mr. Golden says, your Honor is starting in the middle. Because something comes up, your Honor immediately seizes upon as a piece of—

The Court (Interceding): I don't think it is unfair, in view of the record here and the situation, I don't think it is proper to take those records and

not return them to the Internal Revenue. [489]

Mr. Gillen: Your Honor understands what the law is, the Internal Revenue only has the right to inspect records of a defendant and not to have possession of them. I think that was pointed out by Mr. Avakian.

While we are talking, I would like to say this—I am afraid your Honor mistakes vehement and earnest advocacy from the floor of the court room for personal affront on the Court.

The Court: No, I do not.

Mr. Gillen: It has never been intended as such. It is strong advocacy—perhaps we are a little more vehement than your Honor is used to encountering, but it is done in the nature of sincere realization of our duty as advocates for the defendant whom we represent.

The Court: Do not think I have any feeling at all. I am not going to pursue that any more. I have no feeling. What I hear from you has just as much consideration as coming from any gentleman in this room. Now don't think there is any feeling at all. I have not any. I am trying to be, and will continue to try to be, fair but when we make an order, we are going to have that order obeyed.

Mr. Golden: Your Honor, I want the record to show that this material was originally taken upon promise of Mr. Weaver to return it to us——

The Court: I only go this far back and no farther—Mr. [490] Semenza obtained those records with the understanding he was to return them.

Mr. Golden: The government never got title to them and it is our property.

The Court: Well, we will call in the jury.

Mr. Golden: And to deliver these to the court and leave open to inspection of the prosecution is unfair and unjust and prejudicial error and not the American idea.

The Court: Let us not have any trouble and I do not want to punish you, but I am not going to let you fill this record with that kind of remarks. Now please stop; no more. Call in the jury.

(Jury returned into court at 11:40.)

(Defendant present with counsel. Presence of the jury and alternate jurors stipulated.)

(Jury and alternate jurors admonished and recess taken at 12:50.)

Afternoon Session, December 7, 1951—2:15 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEISZ

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Gillen: With regard, may it please the Court, to the exhibits which were offered this morning, that would be [491] prosecution's 72 to 92,

(Testimony of Chris R. Weisz.)

inclusive, and included among those are several bearing additional "A" designations, such as 72A, 87A and 88A, the defense is willing to stipulate that they may be offered in evidence if the prosecution so desires, subject, of course, to motion to strike in the event there is any need for it.

Mr. Campbell: Then they will be offered with that agreement.

The Court: Very well, exhibits numbered 72 to 92, inclusive, including 72A, 87A, and 88A, are admitted in evidence.

Q. Mr. Weisz, did you also personally make a search of the files and records of the Collector of Internal Revenue for the Northern District of California, for the purpose of ascertaining whether or not any income tax returns were filed in that office for or on behalf of Elmer or Helen Remmer for the years 1935 to 1941, inclusive? A. I did.

Q. And what did such search disclose?

A. No record.

Q. Incidentally, in connection with the records which are kept there and the method which is followed when an income tax return is filed by an individual, what record is made of it?

A. A 3 by 5 card is made of every income tax return that is filed. [492]

Q. Is that made whether or not the return shows a taxable income? A. Yes.

Q. And for what period of time is that record maintained?

A. Well, they are there from the beginning of the income tax period, 1913.

(Testimony of Chris R. Weisz.)

Q. And in what form are they kept?

A. The 3 by 5 cards, I believe, up to 1944;—I am not quite sure—are kept on microfilms.

Q. That is for the purpose of compressing the record, saving space, is that correct?

A. Saving storage space.

Q. And did you examine the microfilms for the years 1935 and 1941 inclusive, that is, for the purpose of determining whether or not any returns had been filed by those individuals for any of these years? A. I did.

Q. And you state you found no record, is that correct? A. No record.

Q. Incidentally, what territorial limits does the collector in San Francisco cover?

A. Well, I don't know what the south boundary is.

Q. It does, however, cover all of northern California?

Mr. Gillen: I don't think counsel should lead. If the witness doesn't know, he doesn't know. I offer the objection. [493]

Mr. Campbell: That is a matter of law, of course. I think that is all. You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Weisz, any index card records that are kept in your office are kept only for the Northern District of California, is that correct?

A. Yes.

(Testimony of Chris R. Weisz.)

Q. So it wouldn't reflect what had been filed for any other district? A. No, sir.

Q. When did you change from the card system to the microphoto system?

A. Well, they done that possibly about two years ago, they came in and microfilmed the cards.

Q. How long have you been up here under direction to be in this court?

Mr. Campbell: Objected to as immaterial.

Mr. Gillen: It is preliminary to asking another question regarding his personal services.

The Court: Objection sustained.

Q. When did you make this search of the index cards?

A. Well, within a few days before coming up here.

Q. When was that, can you fix the time better?

A. I made this search during the week of the 19th of November, 19, 20, 21, 22, and 23 I worked on these returns. [494]

Q. Who was it that told you to search and see if there was any index card for Elmer Remmer or Helen Remmer in San Francisco?

A. Well, I got my first orders from Mr. McCall, the assistant collector, to see—

Mr. Campbell: I think that answers the question, what instructions he got. He was asked from whom he got the instructions.

(Testimony of Chris R. Weisz.)

The Court: I don't think he answered the question. He said he got his first orders—he may go ahead.

(Question and answer read.)

A. (Continuing): —to see Mr. Campbell, the attorney, and I saw Mr. Weaver and Mr. Shelton and they gave me the data that was required.

Q. And included in your instructions was the request made to you, were you specifically told, to see if there was any index card for Elmer Remmer or Helen Remmer, or either of them, between 1935 and 1941? A. Yes.

Q. And that was some time prior to the 19th of October? A. No, that was during that week.

Q. During the week, as I understand, you made your search, you got your instructions prior to the 19th, did you not, or at least on the 19th?

A. Yes, probably on the 19th. [495]

Q. Was that October or November, did you say?

A. November.

Q. November, I beg your pardon. Now I understood you to say that you had made a personal search of the records and had obtained and produced the various returns for various partnerships which have been mentioned here and which are now admitted under designations of prosecution's Exhibits 72 to 92 inclusive, including several others that have a special designation of the number with an "A" attached. Is that correct? A. Yes.

Q. And I understood you to say that you found,

(Testimony of Chris R. Weisz.)

with regard to the 186 Club, that you found returns for 1944 and 1945, but not return for 1946, is that correct? A. That's right.

Q. Then with regard to that same enterprise, 186 Club, were you requested to obtain, or did you look for a return for 1943? A. Yes.

Q. Were you able to find any?

A. We have a return for the fiscal year 1943.

Q. We are talking about the 186 Club?

A. Yes.

Q. Did you find any returns for the year 1943?

Mr. Campbell: I submit he just answered he found return for the fiscal year '43.

Q. Did you find any return for the fiscal year 1943? [496]

Mr. Campbell: Objected to as asked and answered.

The Court: Well, you may proceed.

A. I found a partnership return.

Q. Did you find any other returns for that year for the 186 Club?

A. I have a note here, says 6-30-42 on form 1121.

Q. Do you have that return?

A. Well, that was one of those that was introduced in evidence.

Q. No, on the 1943 return. Do you have that with you?

Mr. Campbell: According to our records that is introduced, for the fiscal year beginning July 1,

(Testimony of Chris R. Weisz.)

1943, and ending June 30, 1944, being plaintiff's Exhibit 87.

A. That is what I refer to, 6-30-43.

Q. You say that you found 6-30-43, is that correct?

A. Well, for the fiscal year beginning 6-30-43.

Q. Now counsel stated a moment ago that that return I am referring to is now prosecution's exhibit 87. I think if counsel will look at it, he will find out it is for the next fiscal year, 6-30-44.

Mr. Campbell: Fiscal year beginning July 1, 1943, and ending June 30, 1944.

Mr. Gillen: That is not what you said.

Mr. Campbell: The exhibit speaks for itself, if the Court please.

Mr. Gillen: I think we are talking at cross purposes. [497]

Q. Do you have a return with you for the fiscal year ending June 30, 1943? A. Yes.

Q. May I see it please?

(Defendant's Exhibit J.)

Q. How many returns are handled by the Collector for the Northern District of California, on an average, do you know?

A. Approximately two million.

Mr. Campbell: That is per annum?

A. That is for the year.

Q. What was the situation with regard to the number of returns handled in the years between 1942 and 1946? Was it about the same, if you are familiar with it?

(Testimony of Chris R. Weisz.)

A. Well, I wouldn't put any figure on what they were in 1942. They were somewhat less, of course, more taxpayers now than there were then. During the present time they are handling approximately two million returns.

Q. In the Northern District of California you say there were somewhat less taxpayers in 1942? Do you have any information on the intervening years, or any knowledge? A. No.

Q. In the office of the Collector of the Northern District of California have you any knowledge of whether or not returns are ever mislaid or lost?

Mr. Campbell: Objected to. He can question if some particular [498] returns have been mislaid or lost.

The Court: He may answer the question.

A. Well, not to my knowledge.

Q. You never heard of a case?

Mr. Campbell: As to hearsay, I object.

The Court: That may be.

Mr. Gillen: I will reframe the question.

Q. Has it ever come to your attention or knowledge that any return was mislaid or lost out of two million returns handled?

Mr. Campbell: Objected to as hearsay.

The Court: Overruled. You may answer the question.

(Question read.)

Q. In any year? A. Well, not officially.

(Testimony of Chris R. Weisz.)

Q. What do you mean by that, "not officially." Do things get lost officially and unofficially in your office?

Mr. Campbell: If the Court please, if it hasn't come to his knowledge officially——

The Court: I think we are dealing in things not so important right now. You may proceed.

A. Well, you might hear of some return being missing, but you might not be officially connected with that return; therefore, so far as I am concerned, I don't recall any return I have searched for or had anything to do with as being mislaid, that I recall. [499]

Q. Now you personally searched for the 1946 return of the 186 Club, did you not? A. Yes.

Q. You made that search personally?

A. Yes.

Q. And you found no record of any return for 1946 for the 186 Club? A. That's right.

Q. And that is the reason that you testified here today that there was no 1946 return for the 186 Club, is that correct?

A. As far as my search went, I couldn't find anything.

Q. And of course I am referring to the 1946 return, I am referring to the fiscal year ending in June of 1946. A. Yes, I understand that.

Q. You could find none and there is none brought with you that is any such return?

A. There was no record of it that I could find.

(Testimony of Chris R. Weisz.)

Q. I will show you here a letter on a letterhead, and I will ask you if you recognize the letterhead and the signature? You may answer that yes or no.

A. Yes.

Mr. Gillen: I would like this marked for identification, may it please the Court.

The Court: K.

Q. I am going to show you the exhibit again—counsel has seen [500] it—can you tell us whose letterhead that is and whose signature is attached thereto?

Mr. Campbell: That is objected to unless it is shown that this witness has any familiarity with the contents of the letter.

The Court: I think the witness has identified the letter. Do you want to offer it?

Mr. Gillen: Yes, I will offer it in evidence.

Mr. Campbell: Objected to, no proper foundation laid.

The Court: Overruled. Proceed with your questions.

(Question read.)

A. That is the letterhead of the Treasury Department, Internal Revenue Services, on the office of Internal Revenue agent Harliss.

Q. At what place? A. San Francisco.

Q. Are you familiar with the signature appearing on that letter? A. No.

Q. Do you know a man by the name of Harliss in the Internal Revenue Service?

(Testimony of Chris R. Weisz.)

A. I know of him.

Q. What is this man's position in the Internal Revenue?

A. He was Internal Revenue Agent in charge, which is a separate department. [501]

Q. Do you know his full name?

A. No, I do not.

Q. Have you never seen his name on any correspondence?

A. Oh yes, I have seen his name.

Q. Don't you recognize his signature there on that letter I showed you that you hold in your hand? A. No, I don't.

Q. Doesn't it look like the signature you have seen of Frank Harliss, the Internal Revenue Agent in charge, and other documents that have come to your attention?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Well, does it look like the signature of Frank Harliss you have seen on other official documents?

Mr. Campbell: Same objection.

Mr. Gillen: This is cross-examination.

The Court: Objection sustained.

Mr. Gillen: On the ground it is argumentative?

The Court: Yes.

Mr. Gillen: Well, I don't know how to put it. I asked if it appears to be the same signature he had seen on other official documents.

Mr. Campbell: He stated he didn't recognize the signature.

(Testimony of Chris R. Weisz.)

Mr. Gillen: He said he had seen the signature of Mr. Harliss [502] on other documents.

The Court: What is your question now?

Mr. Campbell: The question is, the witness having answered that he knows who Mr. Harliss is and knows his official position and that he has seen Mr. Harliss' signature on other documents, I am asking him to look at that letter he holds in his hand and tell me whether or not he recognizes that as the same signature he has seen on other official documents.

The Court: You may answer the question.

A. I have seen very few signatures of Mr. Harliss and to the best of my recollection the documents of Mr. Harliss that I have seen were signed by a rubber stamp and I do not believe this was a rubber stamp.

Q. Well, the general framing of the letter, the appearance of the signature, does it appear to you to be the same as other signatures, either original or rubber stamp signatures, you have seen?

Mr. Campbell: I am going to make my objection again—

The Court: Objection sustained.

Mr. Gillen: I will now, with the Court's permission, ask Mr. Campbell, who is familiar with the signature of Mr. Frank M. Harliss, I am sure, if he will stipulate that this is an official letter signed by Mr. Harliss?

Mr. Campbell: I will state on its face, it is not signed by Mr. Harliss. [503]

(Testimony of Chris R. Weisz.)

Mr. Gillen: Does it look like Mr. Harliss' signature and official piece of stationery?

Mr. Campbell: If Mr. Gillen wants to call me as his witness.

Mr. Gillen: I take it counsel is not sporting enough to stipulate.

Mr. Campbell: I resent that remark.

The Court: We will have the remarks stricken from the record.

Mr. Gillen: We have made every endeavor to stipulate and facilitate—

The Court: We will deal with what we have here.

Mr. Gillen: I will offer this exhibit as the proper foundation is laid.

Mr. Campbell: To which I object; no proper foundation has been laid.

The Court: Objection sustained.

Q. Let me ask you if you were familiar, Mr. Weisz, with this form letter as an official form of the Internal Revenue Service? A. Yes.

Q. Is that an official form of the Internal Revenue Service covering the subject matter contained in that letter?

Mr. Campbell: Objected to as calling for conclusion of the witness.

Mr. Gillen: He says he is familiar with it. [504]

The Court: Objection overruled. It may be admitted in evidence.

Mr. Gillen: Thank you, your Honor. With the Court's permission, I desire to read this letter to the jury at this time. The letterhead, in printing,

(Testimony of Chris R. Weisz.)

is the Treasury Department, Internal Revenue Service, San Francisco 5, California. It bears the coat of arms of the Revenue Service and in printing, "Office of Internal Revenue Agent in Charge, San Francisco."

(Reads Exhibit K.)

Q. Now I am going to show you some other documents, Mr. Weisz, and ask you whether or not you are familiar with this document, and incidentally, while counsel is looking at them, let me ask you this, this letter is no more than the government asking the taxpayer to waive statute of limitations and give the government more time to look into the books?

Mr. Campbell: Objected to as calling for conclusion of the witness. The letter speaks for itself.

The Court: Objection overruled.

A. Yes.

Q. And that form 872, which is referred to and noted as an enclosure here, is the form wherein the taxpayer gives the government more time to examine his books, isn't that so? A. Yes.

Q. And the taxpayer doesn't have to, if he doesn't want to, isn't that true? [505]

Mr. Campbell: That is objected to. Well, that is all right.

Q. I will show you some sheets on salmon paper form in printing and ask you to look at those and

(Testimony of Chris R. Weisz.)
tell us whether or not you are familiar with those forms?

A. Yes.

Mr. Gillen: I would like to have these marked.
The Court: Exhibits L-1, L-2, L-3, L-4.

Q. What are those forms that are now marked defendant's Exhibits L-1, 2, 3, and 4?

Mr. Campbell: I am going to make an objection as not being within the scope of direct examination. I think we are getting extraneous matters into the record.

Mr. Gillen: May I be heard?

The Court: Objection will be overruled, consent forms.

Q. They are forms of consent, that is, form where the taxpayers gives the government more time to look into his books? A. That's right.

Q. The reason the government asks for more time is so they won't be barred from the statute of limitations from looking into a man's books to determine whether or not he should be prosecuted?

Mr. Campbell: Same objection.

The Court: I am going to ask, Mr. Gillen, I just don't see what this has to do with any subject matter [506] brought out on direct.

Mr. Gillen: He says there was no return for 1946. We not only find there was a return, but there was considerable correspondence, that the government had asked for more time.

The Court: Do these documents here—

Mr. Gillen: Include 1946, yes, your Honor. The

(Testimony of Chris R. Weisz.)

letter referred, your Honor, to the returns that were in the hands of the government.

The Court: Very well, you may proceed.

(Question read.)

Mr. Campbell: We object—

The Court: Objection is sustained to that question.

Q. What is the reason the government asks for the taxpayer to extend time to the government to prevent statute of limitations running against the government?

Mr. Campbell: Same objection.

The Court: Objection will be sustained.

(Recess taken at 3:00. Jury and alternate juror admonished.)

3:15 P. M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEISZ

resumes the witness stand on

Cross-Examination

By Mr. Gillen:

Mr. Gillen: I was just showing counsel what appeared to [507] be three original letters. With the Court's permission, I will hand them to you and ask you whether or not you recognize the letterheads? A. Yes.

(Testimony of Chris R. Weisz.)

Mr. Gillen: I would like to have these marked as either one or three exhibits.

The Court: M-1, 2, and 3.

Q. What are those three letterheads, Mr. Weisz?

Mr. Campbell: Objected to. They speak for themselves, if the Court please.

The Court: He may answer the question. Don't state the contents, just the general nature.

A. They are official government letterheads.

Q. Did you observe the signature on those letters? A. No, I did not.

Q. I ask you to look at the signature on those three letters and tell us if you recognize it?

A. I recognize the name, of course.

Q. Do you recognize the official designation under the name? A. Yes.

Q. The name is that of F. M. Harliss, is that right? A. Yes.

Q. And the official designation is Agent in Charge of Internal Revenue Service?

A. Internal Revenue Agent in Charge. [508]

Mr. Gillen: I offer them.

Mr. Campbell: May I ask a question on voir dire?

The Court: You may do so.

Q. (By Mr. Campbell): Did any of these letters originate from your office? A. No.

Q. Or from the office to which you are attached?

A. No.

Q. Those letters, judging from their letterhead, originated from the office of the Internal Revenue

(Testimony of Chris R. Weisz.)

Agent in Charge, did they not? A. Yes.

Q. Where is his office located, if you know?

A. 74 New Montgomery.

Q. Where is your office located?

A. 100 McAllister Street.

Q. Do you have anything to do with the activities of his office? A. No.

Q. Of any kind whatever? A. No.

Mr. Campbell: I am going to object to their reception in evidence, if the Court please, no proper foundation laid.

The Court: I would like to hear from you on the question. First let me see the exhibit.

Mr. Gillen: I was going to suggest I would like to have [509] your Honor look at it.

Mr. Campbell: Well, while your Honor is examining them, may I point this out, that there is no way in this method for us testing the authenticity of these letters. If I may be heard a moment further. In that record, if the Court please, if this method of producing evidence is to be followed, we are deprived of an opportunity to examine either the writer of the letter, assuming that they are authentic, to obtain the surrounding circumstances of the correspondence, if there was such correspondence, relating to the subject matter to which those letters refer. In other words, under Mr. Gillen's theory, anything which was written on a piece of government stationery would be admissible through this witness because he can recognize the government letter and because he can recognize that

(Testimony of Chris R. Weisz.)

there is an official designation after the signature, with which he is not familiar, at the bottom of the letter.

Mr. Gillen: May I be heard on that?

The Court: May I make this remark first. It seems to me that the only interest we possibly could have in any of the subject matter contained in any or all of these letters would be the question as to whether or not there was a return filed for the year ending June 30, 1946.

Mr. Campbell: That is correct, your Honor.

Mr. Gillen: This witness has testified, your Honor, [510] that he has examined the records of the government to determine whether or not there had been a return filed for this corporation, 186 Club, for the fiscal year June 30, 1946. He said there was not, so the impression is left with the jury that there was no return filed. Now we have the right to determine whether he only looked in his own office and did not go to the office of the man across the street or did not make a complete search of anywhere where these records would be handled in the course of official business, and we are offering correspondence pertaining to the very exhibit he said he couldn't find.

Mr. Campbell: I make the objection no proper foundation has been laid for the introduction.

Mr. Gillen: I don't think Mr. Campbell seriously contends those are spurious letters on the letterhead of the Treasury Department of the Internal Revenue Service.

The Court: They may be admitted for that purpose.

(Testimony of Chris R. Weisz.)

Mr. Gillen: If there is any question, I would be happy to offer in evidence letters that brought the response by way of those official letters, I would be happy to show Mr. Campbell. If counsel would be willing to stipulate or would offer no objection, I would like to offer in evidence for the defendant the balance of the correspondence, which would make it clearer to the jury.

The Court: Does counsel desire to accept such a statement? [511]

Mr. Campbell: No, I do not.

The Court: Then they will not be admitted.

Mr. Gillen: Then, of course, it would be a little silly because we only have the answers of the government. We have to do the best we can.

Mr. Campbell: I object to counsel making that statement.

The Court: We will try to avoid making these statements.

Mr. Gillen: With the Court's permission, I would like to read these letters to the jury, Exhibits M-1, M-2, and M-3.

The Court: Yes.

Mr. Gillen: I will read them in accordance with their date. (Reads Exhibit M-1). I wonder if counsel will be willing to stipulate Mr. John R. Golden is one of the attorneys of record in this case and associate?

Mr. Campbell: So stipulated.

Mr. Gillen: Thank you.

Mr. Campbell: You're welcome.

(Testimony of Chris R. Weisz.)

Mr. Gillen: Bearing signature in ink, F. M. Harliss and in typewriting below, "Internal Revenue Agent in Chief" and to the left, "RLS:GY" and the word "Enclosure" in typewriting. The second letter is on different letterhead: (Reads Exhibit M-2. The third letter is on the letterhead of the United States Treasury Office: (Reads Exhibit M-3.)

Q. Now, Mr. Weisz, did you in your search find any other returns [512] for the years 1943, 1944, 1945 and 1946 for any of the following enterprises: the 21 Club—

Mr. Campbell: Will you go one by one because there are certain amended returns which have been filed which he is prepared to produce. I think if you ask a blanket question you will be lost in a maze of papers.

Mr. Gillen: I am lost in a maze of papers right now.

Mr. Campbell: May I make this suggestion—he has a number of amended returns which were filed which can be produced at this time, marked with one number and left for your examination over the week end. Will that be satisfactory?

Mr. Gillen: I think that would be the most practical thing to do to save time.

Mr. Campbell: May he withdraw from the stand and he can assemble those and leave with the clerk for your examination.

Mr. Gillen: Surely.

Mr. Campbell: I have one question, if the Court please.

(Testimony of Chris R. Weisz.)

Mr. Gillen: Only if it is understood my cross-examination is not completed.

The Court: Very well.

Q. (By Mr. Campbell): Mr. Weisz, how are income tax returns, whether they are individual or corporation, filed in the Northern District of California? Are they all filed with the collector of the Internal Revenue at San Francisco, California?

A. Yes. [513]

Mr. Campbell: That's all.

The Court: You may be excused for the time being.

DAVID N. KESSEL,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. My name is David N. Kessel.

Q. Where do you reside?

A. 283 St. James Drive, Piedmont, California.

Q. What is your business or occupation?

A. I have no occupation.

Q. Are you acquainted with the defendant, Elmer Remmer?

A. Judge, may I read a statement?

The Court: Just answer the question yes or no.

A. I refuse to answer the question on the ground it will tend to incriminate me.

(Testimony of David N. Kessel.)

The Court: We had better excuse the jury.

(Jury and alternate jurors admonished and excused at 3:34 p.m.)

(In the absence of the jury.)

The Court: I can't see any reason why the Court should not on Monday morning at 10:00 o'clock, in the presence of the jury, order this witness to answer that question, and that is what I propose to do. I thought perhaps, if we were going to be confronted [514] with questions of this nature, it might be beneficial to have a little argument or discussion of the subject matter.

Mr. Gillen: May I make our position clear, may it please the Court. This witness is a government witness. We have nothing to do with this witness. It is immaterial to us whether he testifies or not and I want it clearly understood that we are not participating in whatever procedure is taken between the Court and the prosecution and this witness.

The Court: I see; thank you.

Mr. Campbell: So far as the government is concerned, the evidence has shown here that this man was associated with the defendant in various business enterprises. We intend to interrogate him to the extent of our ability as to the extent of that association and as to the monetary rewards which resulted from that association. That is the government's position.

(Testimony of David N. Kessel.)

The Court: I take it that he is going to raise the question as to whether or not such answers would incriminate him.

Mr. Campbell: Apparently he is equipped with some statement which he has brought with him in that regard. I understand he is also accompanied by counsel. However, the government desires to press this question and the succeeding questions along the line which I have indicated to your Honor.

The Court: Well, he will be ordered to answer this [515] question that is propounded to him. Perhaps I was too hasty in dismissing the jury. I thought we might accomplish something by discussion of some legal point that might be involved in this general subject. If that isn't the idea, we might as well adjourn now and go home. This particular question the witness is ordered to answer at the beginning of court and that order will be repeated in the presence of the jury.

Mr. Campbell: Of course, the question of incrimination would have to be put up as to each question put to the witness, but certainly this type of question can not be incriminating.

The Court: No. I am sorry I did excuse the jury under the circumstances. We will be in recess until Monday morning at 10:00 o'clock. This witness, and all other witnesses under subpoena and not excused are ordered to be here Monday morning.

(Court adjourned at 3:40 p.m.) [516]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the testimony adduced and the proceedings had in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the trial starting November 28, 1951, at Carson City, Nevada, and that the foregoing pages, numbered 1 to 516, inclusive, comprising Volume 1 of said transcript, dated November 28, 1951, to December 7, 1951, inclusive, is a true and correct transcript of my said shorthand notes taken for those dates, to the best of my knowledge and ability.

Dated at Carson City, Nevada, January 28, 1952.

/s/ MARIE D. MCINTYRE,
Official Reporter.

[Endorsed]: Filed January 28, 1952. [516-A]

December 10, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

DAVID N. KESSEL

resumes the witness stand on

Direct Examination

By Mr. Campbell:

Q. You were sworn Friday, Mr. Kessel. Are you acquainted with the defendant, Elmer Remmer?

A. I declined to answer Friday, didn't I, your Honor?

The Court: I will have the question read to the witness.

(Last question and answer of Friday read.)

"Q. Are you acquainted with the defendant, Elmer Remmer?

"A. I refuse to answer the question the ground it will tend to incriminate me."

Mr. Campbell: At this time I wish to press the question.

The Court: That is your answer now, you refuse to answer on the grounds it will tend to incriminate you?

A. Yes.

The Court: Well, the matter was before the Court Friday and the same response was given and I have been informed, and is it true, that you are represented by counsel?

(Testimony of David N. Kessel.)

A. Yes, sir.

The Court: And you have consulted counsel before you came to the witness stand Friday and you have consulted [517] with counsel since on this very matter?

A. Yes.

The Court: Well, it is the finding of the Court that the question, "Are you acquainted with Mr. Remmer," response to that question, in the opinion of the Court, does not present a reasonable danger or real danger of incrimination and you are ordered to answer the question.

A. I do know Mr. Remmer.

Q. How long have you known Mr. Remmer?

A. I have known him about 10 or 15 years.

Q. Have you ever visited in his home?

A. Oh, yes, a few times.

Q. And did you visit in his home during the years 1944 to 1946 inclusive? A. A few times.

Q. Where did he reside at that time?

A. Well, he lived on Panhandle Blvd., but I don't know the address.

Q. Panhandle Boulevard in what city?

A. El Cerrito.

Q. Does he still live there, if you know?

A. I wouldn't know.

Q. Do you know Mr. Remmer's occupation?

A. I refuse to answer the question. [518]

Q. Upon what ground?

A. Tend to incriminate me.

Mr. Campbell: I press the question.

The Court: Well, you will be detained until tomorrow morning at 10:00 o'clock. You are committed to the custody of the marshal and you have counsel and in the meantime you may consult counsel. You will have a hearing tomorrow morning at 10:00 o'clock on your refusal to answer. You are now committed to the custody of the marshal.

Mr. Haller: Your Honor, may I be heard?

The Court: No, sir. You may consult with Mr. Kessel and I am sure the marshal will give you opportunity to consult with the witness on this question. The witness is committed to the custody of the marshal, to be here tomorrow morning at 10:00 o'clock.

WALTER M. PECHART

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

- Q. Will you state your name please?
- A. Walter M. Pechart.
- Q. Where do you reside?
- A. 311 San Pablo Avenue, El Cerrito.
- Q. What is your occupation?
- A. At present I am not in business. [519]
- Q. What is your former occupation?
- A. Gambling business.
- Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, I am.

(Testimony of Walter M. Pechart.)

Q. How long have you known him?

A. About thirty years.

Q. Have you ever visited in his home?

A. Yes, I have.

Q. And did you visit in his home during the years 1944 to 1946 inclusive? A. Yes, I did.

Q. And where did he reside at that time?

A. El Cerrito, California.

Q. Does he reside there now, to your knowledge?

A. That I can't answer.

Q. Do you know Mr. Remmer's occupation?

A. That I can't answer.

Q. You say you can't answer, is that because you do not know?

A. Well, I knew at one time but at present I don't know.

Q. Did you know his occupation during the years 1944 to 1946, inclusive? A. Yes, I did.

Q. What was his occupation?

A. Gambling business.

Q. Do you know one George Simmons? [520]

A. Yes, I do.

Q. Who is George Simmons?

A. He is my accountant.

Q. Does he have associated with him one Lester Simmons? A. Yes, he does.

Q. And was George Simmons your accountant during the years 1944 to 1946 inclusive?

A. That I can't answer. There are two brothers, they are both accountants. They were both in my employ, but the exact years I can't state.

(Testimony of Walter M. Pechart.)

Q. By two brothers you refer to George and Lester Simmons? A. Yes, I do.

Q. Have you ever rented any real property from Mr. Remmer? A. Yes, I did.

Q. What property?

A. I rented a portion of the 21 Club for two months or three, I am not sure.

Q. Is that the real property sometimes referred to as 90 San Diego Street, El Cerrito?

A. That I am not sure.

Q. You say that you rented a portion of the 21 Club from him? A. Yes, I did.

Q. Where is the 21 Club located?

A. El Cerrito, California.

Q. Do you recall the street address? [521]

A. No, I do not.

Q. Do you recall whether or not it is 90 San Diego Street? A. No, I do not.

Q. And in what years did you rent a portion of those premises? A. That I couldn't state.

Q. You say you cannot state, is that because you do not remember? A. That's right.

Q. What portions of the premises of the 21 Club did you rent from him?

A. The back room.

Q. Did that back room have any particular name? A. San Diego Social Club.

Q. With regard to a portion of the premises which you rented from Mr. Remmer, known as the San Diego Social Club, did you operate any business on those premises?

(Testimony of Walter M. Pechart.)

A. I refuse to answer on the grounds it will tend to incriminate me.

Mr. Campbell: I will press the question.

The Court: You will be detained until tomorrow morning at 10:00 o'clock. You are committed to the custody of the marshal until 10:00 o'clock tomorrow morning.

Have you counsel and have you consulted counsel on the subject matter of your presence here as a witness and the questions which might be required of you? [522]

A. Yes, I have.

The Court: You have counsel now?

A. Yes, I have.

The Court: So the marshal will give counsel an opportunity to confer with Mr. Pechart and you will have a hearing tomorrow morning at 10:00 o'clock on the matter concerning your refusal to answer the question.

Read the question so we will have it in mind.

(Question read.)

The Court: The witness is committed to the custody of the marshal, to be here tomorrow morning at 10:00 o'clock.

Mr. Haller: If the Court please, for the sake of the record—

The Court (Intervening): The witness will be given an opportunity to be heard tomorrow at 10:00 o'clock.

Mr. Gillen: May it please the Court, I was going

to suggest that we haven't concluded our cross-examination of Mr. Weisz.

MR. WEISZ

having been previously sworn, resumed the witness stand on further

Cross-Examination

By Mr. Gillen:

Mr. Campbell: I provided counsel with certain additional returns which they could take over the week end for the purpose of examination. You have them with you, have you, Mr. [523]

Mr. Gillen: Yes, these are the ones.

The Court: I have forgotten—you have entered on your cross-examination before, this is just resuming?

Mr. Gillen: Yes, your Honor. The cross-examination was ended with the examination of certain documents to be produced in court.

Mr. Campbell: As I recall, it reached the point where Mr. Gillen had asked if there were additional amended returns filed and I offered them to counsel at that time and called another witness rather than take the time to examine them.

Mr. Gillen: That was it, your Honor.

Q. Now, Mr. Weisz, I have before me a folder that you produced and in the folder are 1, 2, 3, 4, 5 returns. With the Court's permission I would like you to look at these and after you have looked at them, I will ask you a question. Now, Mr. Weisz, my question is, having examined the folder that I

(Testimony of Chris R. Weisz.)

handed back to you, the one that you produced in court Friday last, have you found, in addition to those and in addition to what has been offered in evidence, any other returns or amended returns for the 21 Club, the 311 Club—

Mr. Campbell (Interrupting): Pardon me, may that be broken into individually? I think he has to refer to different files.

Q. All right, then we will break the question down. In addition to what you have in the folder there and in addition to [524] what may be in evidence or in custody of the court, marked for identification and therefore out of your hands, do you find any other return or amended return, first of all for the 21 Club?

Mr. Campbell: I suggest this question is calling for his conclusion as to what is in the custody of the court.

Mr. Gillen: I am distinguishing what we already have.

Mr. Campbell: I think the question is if he has any more, what he has found any more than he is producing.

The Court: I think that is what you mean?

Mr. Gillen: That is right. I want to eliminate what he has already produced before the court and see if there are any additional, that is my purpose.

A. No.

Q. May I ask you the same question as to the 311 Club, have you in your possession now any

(Testimony of Chris R. Weisz.)

additional returns, or amended returns, for the 311 Club?

A. No, except I brought a 311 Club return with me which was in the wrong return.

Q. By wrong return do you mean that it did not refer to the 311 Club, which is involved in this matter? A. That's right.

Q. It was some other 311 Club?

A. 311 Cafe, and inadvertently put it in with this. Has nothing to do with this. [525]

Q. Was that 311 that you brought a mislaid file?

A. No, we just misread it in going through and didn't realize it was a different return and involves 311 Washington Street, San Francisco, and we put it in.

Q. Now may I ask the same question as to the B & R Smoke Shoppe, any additional returns in your possession, or amended returns, which have not been presented to the court yet?

A. We have these two returns in this file, which I gave you Friday.

Mr. Campbell: Was that for the same year?

Mr. Gillen: No, 1943 and 1944. I should like to offer in evidence the two documents in the form of partnership returns just handed me by the witness. The first document is for the year 1943 for the B & R Smoke Shoppe, and the second document is for the year 1944 for the B & R Smoke Shoppe, both designated "Amended Returns." May they be marked in evidence as defendant's Exhibits?

(Testimony of Chris R. Weisz.)

The Court: Yes.

Mr. Campbell: No objection.

The Court: They may be admitted in evidence as defendant's Exhibits N and O.

Q. Now may I inquire, Mr. Weisz, if you have any additional returns, or amended returns, other than are before the court for 110 Eddy enterprise?

A. No. [526]

Q. Now I will ask the same question with regard to the Day-Night Smoke Store. A. No.

Q. And I will ask the same question with regard to the 186 Club?

A. I have two additional for the 186 Club. These were in the folder which I gave you Friday evening.

Mr. Gillen: I should like to offer both of these in evidence for the defendant, may it please the Court, and I should like to have the partnership return for the year 1943 for the 186 Club marked as the first in order.

The Clerk: P.

Mr. Gillen: And the corporation excess profits return marked next for 1943.

Mr. Campbell: Is that a fiscal or calendar year?

Mr. Gillen: That is a fiscal year.

Mr. Campbell: For identification, will you state the fiscal period for that?

Mr. Gillen: Ending June 30, 1943, and beginning July 1, 1942.

The Court: Exhibit P admitted.

Q. Now I show you here a photostatic copy of

(Testimony of Chris R. Weisz.)

what purports to be an additional return for the calendar year 1944 for the same place, 186 Club, and I will ask you, Mr. Weisz, if you will look at it and tell us exactly what it is. [527]

Mr. Campbell: Just a minute—I am going to object to that, if the Court please, the document should be marked first for identification.

Mr. Gillen: You are right. May I have this marked for identification, your Honor?

Q. I am handing you what I have already described and which is now designated as defendant's Exhibit R for identification. Be kind enough to look at that, Mr. Weisz, and tell us what it represents.

A. That is a corporation income and declared excess profits tax return for the fiscal year July 1, 1942, to June 30, 1943.

Q. Now there are some impressions on there of rubber stamps. Will you tell us what those mean?

A. The received stamp?

Q. Yes, the various rubber stamp impressions that are left on the face of that document, will you tell us what they mean?

A. There is a "Received" stamp dated May 31, 1944, First District of California.

Q. What does that mean, that that was the date it was received by the Collector of Internal Revenue, First District of California?

A. Yes, says, "Received with remittance."

Q. That means received with money that was paid on it?

(Testimony of Chris R. Weisz.)

A. Yes, that's right.

Q. Was there any other stamp bearing any other significance to you as a deputy collector on [528] there?

A. Yes, another stamp on here which says, "Revenue Agent in Charge Received July 12, 1945, San Francisco."

Q. That the revenue agent in charge received that particular document on the date given?

A. Yes.

Q. That would be received from the collector's office, is that correct? A. Correct.

Q. In other words, the May stamp was when the taxpayer turned it into the collector of internal revenue and the July stamp is when the agent in charge received it from the collector, is that correct?

A. That's right.

Q. Any other stamp of significance on there?

A. There is a "Reviewed" stamp, which has been crossed out.

Q. What does the "Reviewed" stamp mean?

Mr. Campbell: Apparently it has been cancelled.

The Court: The witness can answer.

A. Well, the "Reviewed" stamp ordinarily means that it has been reviewed by some office, either the collector's office or the revenue agent's office. I can't tell which one this is. It has been crossed off so badly.

Q. You are not able to determine the date?

A. The date is very clear, date November 30, 1944.

(Testimony of Chris R. Weisz.)

Q. Now, Mr. Weisz, while you are holding that in your hand—— [529]

The Court: Do you want to have this offered in evidence?

Mr. Gillen: Yes, I will offer it.

Mr. Campbell: No objection.

The Court: Exhibit R admitted in evidence.

Q. Now, I will hand back to you Exhibit R, which is now in evidence, and I will show you also Exhibit Q for the defendant, which is also in evidence and which appears to be another form of return for the same corporation for the same period of time. Will you explain the reason for those two different returns for the same corporation for the same period of time?

Mr. Campbell: Objected to, calling for his conclusion as to what was in the taxpayer's mind.

The Court: Let us have the question.

(Question read.)

The Court: We will hear what the answer is.

Mr. Campbell: I didn't understand what the question was.

Mr. Gillen: I presume counsel withdraws the objection?

Mr. Campbell: Yes.

(Question read.)

Q. Two different forms. I have different forms, do you notice that? A. I wouldn't know.

Q. Well, do you know whether or not it is not

(Testimony of Chris R. Weisz.)

a fact that at that particular time all corporations were required to file two forms, one form of which was called the corporation income [530] and deferred value excess profits tax return, which is defendant's Exhibit R, and the other of which was called corporation excess profits tax return, which is defendant's Exhibit Q. Does that recall anything to your mind?

Mr. Campbell: I will stipulate that is a fact, that was the law.

Mr. Gillen: We will accept the stipulation that all corporations were required at that time to return those two forms.

Mr. Campbell: Well, not all corporations, but this type of corporation.

Mr. Gillen: Well, all right, this type of corporation was required to return those two forms for their accounting or fiscal return, whatever it might be.

Mr. Campbell: It is a matter of law.

Q. Now, Mr. Weisz, attached to defendant's Exhibit Q, we find an orange sheet and a green sheet. Can you tell us what those are?

A. That's a consent for extending the statute of limitation.

Q. In other words, that is where the corporation or the taxpayer consents to permit the government to have a longer period than the period of statute of limitations to examine into the matter, is that correct? A. That's right.

Q. In other words, it prevents the outlawing of

(Testimony of Chris R. Weisz.)

the matter, is that correct? [531] A. Yes.

Q. And will you tell us what is the last consent date, what date does it extend to on that exhibit?

A. June 30, 1952.

Q. So the taxpayer has consented to permit the government to have until June 30, 1952, to continue its investigation of that and has not taken advantage of the statute of limitations, is that correct?

A. Yes.

Q. Now, before we leave defendant's Exhibit R, which is the corporation income and declared value excess profits tax return for the fiscal year commencing July 1, 1942, and ending June 30, 1943, and which you have identified as having been received, from the stamp on the face of it by the Collector for the First District of California, on May 31, 1944, do you find in your records the original from which that photostat copy was taken, or the original return which was received on May 1, 1944?

A. I have a note here where I have this number.

Q. Do you know what happened to the return?

A. No, I don't.

Q. Was it misplaced or lost?

A. I don't know.

Q. Did you look for it when you were looking for all these records and were you unable to find it? [532] A. I don't have that note.

Q. You have a note that you were looking for such a numbered document, do you? A. Yes.

Q. What is your recollection when you made the

(Testimony of Chris R. Weisz.)

search? Were you unable to find it where it should have been, or unable to find it any place? Do you have my question in mind? A. Yes, I do.

Q. I am asking you now for your own independent recollection of what you encountered, or what the result of your search was for this particular return?

A. Hasn't this return been offered in evidence, the original?

Q. No, I do not believe so. In fact, I am certain it has not. If you care to look at your evidence, I would be glad to have you check with the clerk. I am sure the original has not been offered in evidence. You have no recollection at this moment of finding that in your search?

A. No, I do not. I do not remember.

Q. You have no recollection of whether you found it or not?

A. That's right, I do not know. There were so many of them.

Q. This return would be a matter that was coming before your official attention, is it not?

A. Yes.

Q. You were assigned to produce this document?

A. That is right. [533]

Q. Would you say that this is an instance where a mislaid or lost return has come officially to your attention?

Mr. Campbell: Objected to because he said he did not know. He has been given the opportunity to make the examination—

(Testimony of Chris R. Weisz.)

Mr. Gillen: All right, we will withdraw the question until such time as he has checked with the clerk of the court. May I suggest he be returned after he has an opportunity to check, so we won't delay matters now?

Mr. Campbell: That is satisfactory.

The Court: Yes.

Q. It appears that 186 Club was a corporation and not a partnership, isn't that correct; is treated as such by the government?

Mr. Campbell: Objected to; that is calling for his conclusion, if the Court please. He is not the man to pass upon such matters.

The Court: I think the question really means what appears from the document.

Mr. Campbell: No, Mr. Gillen just said, treated as such by the government.

The Court: Reframe your question.

Q. From what appears from the documents, the form of returns which you have produced here, which are now in evidence, it is true, is it not, that the United States Internal Revenue [534] collector treated this organization or enterprise, the 186 Club, as a corporation rather than a partnership or individual business?

Mr. Campbell: Objected to as incompetent and immaterial, not within the scope of this man's examination.

The Court: He can answer if he knows. Do you know?

A. Well, the returns would so indicate.

(Testimony of Chris R. Weisz.)

Q. Now, Mr. Weisz, I want to show you plaintiff's Exhibit 89, which you will find is the partnership return for the year 1945 for the Menlo Club, and attached to that is a letter. I would like to have you look at the letter and tell us, if you know, what is the meaning of the initial "M" alongside the purported signature of Elmer Remmer, the defendant?

Mr. Campbell: Just a minute—that portion of the signature certainly can not—

Mr. Gillen: Suppose counsel does not point out his ability or limitation of Mr. Weisz. Mr. Weisz may know more than you think he does.

Mr. Campbell: I ask the jury to disregard the last statement of counsel and also I point out to the Court that the "M" actually referred to is a handwritten "M," which is a portion of the signature; therefore, I object to the question as calling for conclusion of this witness.

Mr. Gillen: I am asking him if he has any knowledge. If he hasn't, all he has to do is to say no.

The Court: Let us have the question. [535]

(Question read.)

Mr. Campbell: I will ask your Honor to examine the exhibit.

The Court: He may answer the question.

A. No.

Q. You don't know whether it means Maundrell for Harold Maundrell who was the bookkeeper for the Menlo Club, do you? A. No.

(Testimony of Chris R. Weisz.)

Mr. Gillen: With the Court's permission, I would like to read from the letter attached to the 1945 Menlo Club return, which is plaintiff's Exhibit 89 in evidence. I would like to read the letter.

The Court: You may.

Mr. Gillen: This is all in typewriting with the exception of the purported signature. (Reads Exhibit 89.)

Q. And then the inked signature, "Elmer F. Remer" and then below that the inked initial "M," and below that in typewriting the word "Partner." Now, it appears, does it not, Mr. Weisz, that the data from some period the preceding year had been used as the basis of estimating to arrive at what was due that year, is that correct?

Mr. Campbell: Objected to as argumentative. The document speaks for itself and makes its own explanation.

Mr. Gillen: All right, I will withdraw it.

The Court: It is withdrawn. [536]

Q. I am going to show you, Mr. Weisz, plaintiff's Exhibit 57 for identification, which appears to be a 1943 return for the 21 Club and San Diego Social Club, which you produced here on Friday, if my recollection serves me right. If there is no objection and without further ado, I will offer it in evidence.

Mr. Campbell: We have no objection, your Honor, provided that, for the purpose of keeping the exhibits in some semblance of order, that it be

(Testimony of Chris R. Weisz.)

marked as exhibit for the defendant instead of plaintiff's number.

The Court: Instead of being admitted as Exhibit 57, it would be admitted as defendant's exhibit next in order, Exhibit S.

Mr. Campbell: That was produced when Mr. Billington was on the stand.

The Court: Yes, just a moment. We can get along without any discussion.

Mr. Gillen: I think that is all, Mr. Weisz, thank you. Jury and alternate jurors admonished and short recess taken at 11 o'clock.

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEISZ

resumes the witness stand on

Redirect Examination

By Mr. Campbell:

Q. Mr. Weisz, prior to the recess— [537]

Mr. Gillen: May I interrupt counsel for a moment. Did Mr. Weisz learn whether or not the exhibit R, the photostat, there was in his record any note of that?

Mr. Campbell: Yes, I am just going to show him defendant's Exhibit J for identification and ask him if that is not the same exhibit of which a pho-

(Testimony of Chris R. Weisz.)

tostat has been put in as defendant's R, concerning which he was asked whether or not he had produced such a document.

Mr. Gillen: We will stipulate it is.

Mr. Campbell: I wish to show that to the witness.

The Court: You may proceed.

Q. I am going to hand you defendant's Exhibit R, the photostatic copy of which was shown to you by Mr. Gillen. He asked you if that was an instance of a misplaced return; and also defendant's Exhibit J for identification, and ask you to compare them and state whether or not J for identification is the original of which R is a photostatic copy? A. Yes.

Mr. Campbell: Thank you. That's all.

Recross-Examination

By Mr. Gillen:

Q. Mr. Weisz, "J" for identification is the document that we called for and received from you on cross-examination, isn't that correct?

A. Well, I produced it at some time.

Q. It is marked defendant's Exhibit. It was called for, isn't [538] that true?

A. Yes, it must be.

Mr. Gillen: We offer it as defendant's J in evidence.

Mr. Campbell: Do you wish to withdraw R at this time?

Mr. Gillen: No, we will leave them both in.

(Testimony of Chris R. Weisz.)

Mr. Campbell: Very well.

The Court: Exhibit J is admitted.

Mr. Campbell: That's all, Mr. Weisz.

The Court: Is there any reason why this witness could not be finally excused now?

Mr. Campbell: We desire to keep him for other purposes.

The Court: Very well.

GEORGE E. SIMMONS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. George E. Simmons.

Q. Where do you reside, Mr. Simmons?

A. El Cerrito, California.

Q. What is your business or occupation?

A. Public accountant, insurance and real estate.

Q. What is the name of your firm or the concern with which you are located?

A. My own practice.

Q. You practice under the name of George Simmons? [539] A. G. E. Simmons.

Q. And do you have any one associated with you in that business?

A. No public accountant, no.

Q. Is there one Lester Simmons who is associated with you?

(Testimony of George E. Simmons.)

A. He was associated with me.

Q. And over what period of time was he associated with you?

A. To about 1944 to 1947 or '48, I don't remember which.

Q. What is the office address of your business?

A. The present office, 3803 McDonald Avenue, Richmond.

Q. Now, in connection with your public accounting work, did you keep, or supervise the keeping of the records of the 21 Club?

A. Will you restate the question?

(Question read.)

A. No, sir.

Q. Did you at any time have the records of the 21 Club? A. No, sir.

Q. Did any one connected with your firm or your business do so?

A. I might explain that I was hired as an auditor and bookkeeper, not to supervise and not in an accounting capacity; simply was an employee.

Q. I asked you, did you keep the books of the 21 Club? A. Yes, sir.

Q. You did keep them? A. Yes, sir. [540]

Q. Did you keep the books of the San Diego Social Club? A. Yes, sir.

Q. And did you keep the books of the 311 Club?

A. Yes, sir.

Q. By whom were you employed for that purpose? A. Messrs. Pechart and Kessel.

(Testimony of George E. Simmons.)

Q. By Messrs. Pechart and Kessel, you refer to the two men who were on the stand here this morning? A. Yes, sir.

Q. Are you acquainted with the defendant, Elmer Remmer?

A. No, sir—correction—I know of Elmer Remmer.

Q. Did you ever meet Elmer Remmer?

A. Yes, sir.

Q. And did you ever meet him in connection with your employment as to the books of the 21 Club, the San Diego Social Club or the 311 Club?

A. I never discussed it with him.

Q. Did you keep the books of those three clubs during the years 1944, 1945, and 1946?

The Court: Maybe I missed something, I don't quite get that question. I only heard two clubs with which this gentleman was employed.

Q. Mr. Simmons, I asked you as to the 21 Club, you kept the books there? A. Yes. [541]

Q. You also kept books of the San Diego Social Club? A. That is right.

Q. And did you also keep the books of the 311 Club? A. Yes, sir.

Q. And did you keep those books of those three clubs during the years 1944, 1945 and 1946?

A. I don't remember whether the 311 was in existence at that time. If it was, I kept the books.

Q. You do recall that the 21 Club and the San Diego Social Club were in existence at that time, is that correct? A. Yes, sir.

(Testimony of George E. Simmons.)

Q. And if the 311 Club was in existence at that time, you kept its books, is that right?

A. Yes, sir.

Q. Now you were served with a subpoena, Mr. Simmons, to produce all books of any description for the period January 1, 1943, to January 31, 1947, inclusive, relating to the following businesses: 21 Club, San Diego Social Club, and 311 Club, all of El Cerrito, California. Have you produced such records? A. No, sir.

Q. Do you have any records of any kind relating to those three clubs in your possession?

A. No, sir.

Q. Do you have any work papers with relation to those three clubs in your possession? [542]

A. No, sir.

Q. When was the last time such matters were in your possession?

A. As far as I can remember in 1947 and the first part of '48.

Q. Had you delivered all such records to some one at that time?

A. They were left with the employer when I left his employ.

Q. You have not, since 1947 or 1948, been employed in connection with any of these three businesses?

A. No, sir. I might amend that to this extent, that in 1949 I handled the books of one small restaurant for Pechart and Kessel.

(Testimony of George E. Simmons.)

Q. Aside from that, you severed your relationship, is that correct? A. Yes, sir.

Q. Are you acquainted with one Joseph Billington? A. Yes, sir.

Q. Now, in connection with those three businesses to which I have referred, did you prepare certain partnership returns of income for them?

A. Yes, sir.

Q. I am going to show you plaintiff's Exhibit 54, being partnership return of income Jos. Billington, doing business as 21 Club, and ask you if that is a return which you prepared in 1944?

A. Yes, sir.

Q. What was the source of the information which you placed in [543] this return?

A. The source was from Messrs. Billington and Pechart and Kessel.

Q. Did you examine any books or records in that connection? A. Yes, sir.

Q. Were those books and records which were kept by you? A. Yes, sir.

Q. Now, Mr. Simmons, you were familiar, were you not, with the operation and the nature of the operation of the 21 Club? A. Yes, sir.

Q. Where was it located?

A. In El Cerrito on Panhandle Boulevard and San Diego Street.

Q. Was that at an address known as 90 San Diego Street? A. I believe so.

Q. Would it refresh your recollection to examine the return? A. That's right.

(Testimony of George E. Simmons.)

Q. Now at 90 San Diego Street was there more than one of these clubs located?

A. There was one building which had a restaurant and bar in one section, a gambling house in the other section.

Q. The restaurant and bar were known under what name? A. The 21 Club.

Q. And the gambling part was known by what name? A. San Diego Social Club.

Q. First let me ask you as to the physical set-up. Was the [544] gambling establishment behind the restaurant and bar or to one side?

A. Well, it depends what way you look at the building. The entrance was into the bar and restaurant. The gambling was in the other room.

Q. Was there a separate entrance to the gambling establishment? A. Not that I know of.

Q. So that in order to enter the gambling establishment one had to pass through the bar and restaurant, is that right?

Mr. Gillen: Objected to as leading and suggestive, also misquoting the witness. The witness said he didn't know that he knew of.

Mr. Campbell: Well, it is immaterial. I will withdraw it.

Q. Now with reference to these books which you kept both for the 21 Club and the San Diego Social Club, where did you keep them?

A. 315 San Pablo Avenue.

Q. At your office? A. Yes, sir.

Q. From what source did you get the informa-

(Testimony of George E. Simmons.)

tion—let us take the 21 Club first—that went into those books?

Mr. Gillen: Objected to as already asked and answered. He said he kept the books and got the information from Pechart, Kessel and [545] Billington.

The Court: Objection overruled.

A. The information was received daily or weekly in the form of report from the manager, which were entered into the records as I kept them.

Q. Who was the manager of the 21 Club?

A. The first time was Mr. Cavani and later Mr. Billington.

Q. Do you recall during what period of time it was Mr. Cavani?

A. Well, Mr. Cavani was the first. I don't remember what time Mr. Billington took over. I think it was in October of 1945 or '46. I think it is '45.

Q. Who was manager of the San Diego Social Club from whom you got information?

A. Mr. Billington.

Q. So then, as I understand, the San Diego Social Club was a gambling room?

A. That's right.

Q. Mr. Cavani managed the bar and restaurant, is that correct? A. Yes, sir.

Q. And Mr. Billington managed the gambling establishment? A. Yes, sir.

Q. Now was the 21 Club a sole proprietorship, a partnership, or a corporation?

(Testimony of George E. Simmons.)

A. As I remember, Mr. Cavani operated the 21 Club as an individual for some time.

Q. Then? [546]

A. I am not entirely sure. Apparently it was all grouped together after that between Mr. Billington and Mr. Cavani. The operations were consolidated.

Mr. Gillen: I will object, if the Court please, and move the answer be stricken as purely opinion, conclusion and speculation of the witness; if your Honor will listen to the answer.

The Court: Motion will be denied.

Q. I am going to show you government's Exhibit 72, partnership return of income of the 21 Club for the fiscal year beginning January 1, 1944, and ending September 30, 1944, and ask you if you prepared that return? A. No, sir.

Q. Do you know by whom it was prepared?

A. No, sir.

Q. I am going to show you government's Exhibit 72A, partnership return of income for the calendar year 1944 of Frank Cavani, doing business as the 21 Club, and ask you whether or not you prepared that return? A. Yes, sir.

Q. I am going to show you plaintiff's Exhibit 54, partnership return of income for the calendar year 1944 of Joseph Billington, doing business as 21 Club, and ask you if you prepared that return?

A. Yes, sir. [547]

Q. Now I call your attention to the fact that both of these returns purport to be of the 21 Club,

(Testimony of George E. Simmons.)

one being that of Frank Cavani, doing business as the 21 Club, and the other that of Joseph Billington, doing business as the 21 Club, and ask, if you will, to state why the two returns were filed?

The Court: Will you refer to the exhibit numbers in your questions?

Q. In asking you that question, Mr. Simmons, I am referring to plaintiff's Exhibits 54 and 72A, being partnership returns, both for the calendar year 1944.

A. I don't know. I prepared them, but I don't know.

Q. Upon whose instructions did you prepare those returns?

Mr. Gillen: Just a moment. I am going to offer an objection, assuming something not in evidence—upon whose instructions. It is leading and suggestive and the witness has already answered he doesn't know why two returns were made.

The Court: It is leading.

Mr. Campbell: I don't think it suggests who gave him the instructions. Very well, I will withdraw the question.

Q. Can you state from the examination of those returns, if you will first examine plaintiff's Exhibit 54, Mr. Simmons, will you state the nature of the operation set forth thereon?

Mr. Gillen: Objected to, the document speaks for itself. It is in evidence.

The Court: Read the question. [548]

(Question read.)

(Testimony of George E. Simmons.)

Mr. Gillen: It is previously testified to.

The Court: Objection overruled. Answer the question.

A. I can not tell.

Q. You can't answer. All right, sir.

Mr. Campbell: I would like to have this photostat marked—

The Court: The jury will be excused now.

(Jury admonished and alternate jurors, and excused at 11:40.)

(In the absence of the jury.)

The Court: I desire to have an order entered admitting the witnesses Mr. Kessel and Mr. Pechart, to bail in the sum of five thousand dollars each, conditioned upon their appearance here tomorrow morning and whenever ordered by the Court, and that bail is to be approved by the United States attorney. We will now be in recess until 1:00 o'clock.

Mr. Pike: Before the Court recesses, if we could have a number assigned to this last exhibit, the photostat, by the clerk.

Clerk: 93.

Mr. Gillen: I wonder if I might ask your Honor this. On the appearance Friday of Mr. Kessel on the witness stand and upon his stating to the Court that he declined to answer the question, giving his reasons, I made a statement to your Honor in the absence of the jury as to the position of the defense in this case and I wonder if I may have the permis-

(Testimony of George E. Simmons.)
sion of the [549] Court to make that statement in
the presence of the jury. He is a government
witness.

The Court: Yes, sir, you may. Call it to my at-
tention when we open court again.

Mr. Gillen: Thank you.

(Noon recess taken at 11:45.)

December 10, 1951, 1:45 p.m.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors
stipulated.)

MR. SIMMONS

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Simmons, prior to the noon recess you testified that you had returned all of the records called for in the subpoena duces tecum that was served on you. To whom did you return those records?

A. That were left with the Pechart and Kessel organization when I left.

Q. And at what address?

A. 315 San Pablo Avenue, El Cerrito.

Q. And you have not seen them since that time?

A. No, sir.

Q. Mr. Simmons, I will ask you whether or not, during the course of your employment, you drew a

(Testimony of George E. Simmons.)

profit and loss statement and balance sheet of the 21 Club as of December 31, 1943? [550]

A. I do not remember it.

Mr. Campbell: I will ask to have this marked for identification as government's next in order.

Q. While counsel is examining that, I will ask you whether or not you drew a property schedule of the San Diego Social Club as of 1943 and 1944?

A. I do not remember, sir.

Mr. Campbell: I will ask to have this marked for identification as government's Exhibit 95 for identification.

Q. I show you government's Exhibit 94 for identification and I particularly call your attention to the balance sheet and profit and loss statement attached thereto, and ask you if that is a document which you prepared in the course of your employment?

A. I prepared this. Whether or not the figures are correct, I don't know now.

Q. You did prepare that, however?

A. I did prepare it, yes, sir.

Q. Was that prepared from such books and records as were made available to you or were available to you at that time? A. Yes, sir.

Mr. Campbell: This will be offered in evidence as government's Exhibit 94.

Mr. Gillen: May it please the Court, before your Honor rules on the admission of the document, I would like to ask Mr. [551] Simmons some ques-

(Testimony of George E. Simmons.)

tions on voir dire to inquire as to the authenticity of it?

The Court: Yes, sir.

Q. (By Mr. Gillen): Mr. Simmons, with the Court's permission, I will ask you to look at this exhibit again and tell us what there is about this that causes you to recognize it, or enable you to recognize it as something you prepared?

A. I remember the figure of approximately 1700 loss.

Q. Is that the only thing that enables or assists you? A. Yes, sir.

Q. There is nothing about any of the other figures? A. Just a blank.

Q. But you do recall that you did prepare it. That showed a 1700 odd dollar loss?

A. That's right.

Q. At that time, 1943?

A. This is written in 1944.

Q. I mean for 1943? A. Yes, sir.

Q. There is nothing else about the document that assists you in any wise recalling the preparation? A. That is right, sir.

Mr. Gillen: That is sufficient, your Honor, and I offer the objection to its admission. It purports to be a copy of something. There is no original signature or anything on the [552] document. Would your Honor care to see it?

The Court: Read the previous question and answer.

(Question and answer read.)

(Testimony of George E. Simmons.)

The Court: I think the objection will go more to the weight than to the admissibility. The exhibit will be admitted in evidence, Exhibit 94.

Q. (By Mr. Campbell): Mr. Simmons, I show you plaintiff's Exhibit 95 for identification and ask you if this is a document which you prepared in the course of your employment?

A. I wouldn't know, sir.

Q. Is there anything to which you could refer which might refresh your recollection in that record?

A. Nothing, sir. I have no way.

Q. I am going to show you, Mr. Simmons, government's Exhibits 54 and 72A, being partnership return of income for the year 1944 of Joseph Billington, doing business as the 21 Club, and Frank Cavani, doing business as the 21 Club, respectively, and ask you to examine those, which you have heretofore testified you prepared. I will also hand you government's Exhibit 95 for identification and ask you if examination of the first two mentioned exhibits refreshes your recollection as to preparation of the document marked for identification? You will examine particularly the depreciation schedules set forth on those returns.

A. These returns for Joseph Billington and Frank Carvani, 1944. [553] This memorandum is headed "San Diego Social Club." I can't remember anything about that.

Q. Very well. In connection with the keeping of these books, did you become acquainted with Walter Parman?

(Testimony of George E. Simmons.)

A. I believe the latter part of '43 or the first of '44.

Q. And what, if any, connection did he have with any of these clubs?

A. He was operating manager of the San Diego Social Club.

Q. Do you recall over what period of time?

A. No, sir, I do not.

Q. What do you mean by operating manager?

Mr. Gillen: Objected to as calling for opinion and conclusion.

The Court: Objection overruled. You may answer the question.

Q. He had charge of the gambling portion of the San Diego Social Club for a certain length of time, comparatively short, if I remember.

Q. Do you recall when he left?

A. No, sir.

Q. Do you recall who succeeded him?

A. About seven or eight of them. I can't remember off-hand.

Q. Did you become acquainted, in the course of your employment, with one A. Ruggiardo?

A. Yes, sir. [554]

Q. Sometimes known as Tony Ruggiardo. How do you spell that, Mr. Simmons?

A. I don't know.

Q. What was his connection with the Club?

A. He was manager for a while of the San Diego Social Club.

(Testimony of George E. Simmons.)

Q. When you say manager, do you mean operating manager again? A. Yes, sir.

Q. Over what period of time was he operating manager?

A. 1943 to possibly '45, possibly '46, I can't remember which year.

Q. Was he operating manager at the same time Parman was? A. He preceded Mr. Parman.

Q. I understood you to say that Parman was there in 1943 until early 1944?

A. That is right.

Q. Did you mean preceded or succeeded?

A. They were both there at the same time, they changed off.

Q. It required more than one operating manager?

Mr. Gillen: Objected to as calling for conclusion.

The Court: Objection will be sustained as to that.

Q. To your observation, would there be more than one operating manager present at the same time? A. Yes, sir.

Mr. Gillen: Calling for opinion and conclusion. He might be present and not be working. [555]

The Court: Objection overruled and the answer may stand.

Q. As I understood you to say, Riggardio was there until some time in 1945, is that correct?

A. Or 1946.

Q. Did you become acquainted with one Andrew

(Testimony of George E. Simmons.)

Desimone in the course of your employment?

A. Yes, sir.

Q. What was his connection?

A. Well, I would again call him an operating manager.

Mr. Gillen: Just a minute. I move the answer be stricken, no certainty—would call—stipulation. It is the witness' characterization. If he knows, he should say so, if he doesn't know, he may say so.

The Court: The answer may stand.

Q. Over what period of time was he there?

A. Possibly the same period as the other two.

Q. Now you said Parman left in 1944 and Rigiardo was there until probably 1946. Do you recall how long Desimone was there, over what period?

A. No, sir, I do not.

Q. In the course of your employment did you become acquainted with one Dimitria Sarantos?

A. Yes, sir.

Q. Can you spell that?

A. S-a-r-a-n-t-o-s. [556]

Q. And what was his connection there?

A. Sort of a head game keeper.

Q. What did you observe—

Mr. Gillen: We offer the objection—"sort of a head"—uncertain answer, characterization by the witness.

The Court: The answer may stand.

Q. What period of time was he there?

A. The early part of forty—I just don't know.

Q. You don't recall that time?

(Testimony of George E. Simmons.)

A. I can't recall that time.

Q. In the course of your employment did you become acquainted with one Michael Nechek?

A. Yes, sir.

Q. What was his connection?

A. He was sort of a head game keeper.

Mr. Gillen: Same objection.

The Court: Same ruling.

Q. What do you mean by a head game keeper?

A. I am not very much familiar with the gambling fraternity names and activities. This is from my observation only.

Mr. Gillen: Then I move it be stricken. It is obvious the witness does not know.

The Court: Motion denied.

Q. Just go ahead, what was your observation?

A. Well, he acted as head man at the gambling table. [557]

Q. And over what period of time was he there?

A. I don't know, sir. A very short time.

Q. Do you recall in what year?

A. No, sir.

Q. Mr. Simmons, I am going to show you government's Exhibit 93 for identification, a photostatic copy, and ask you if you recognize the document of which this is a photostat?

A. It is a copy of information that I made up for the field auditor, as I remember.

Q. Was that made up from any books or records which were maintained for that club, the San Diego

(Testimony of George E. Simmons.)

Social Club, for the year 1944, in the course of your employment?

A. I don't know, sir. It might have been made from the books. It might have been made up from memorandum that I had in my possession at the time.

Q. When you say memorandum which you had in your possession at the time, do you refer to memorandum which you had made or which had been provided to you in the course of your employment?

Mr. Gillen: I am going to object to that question, may it please the Court, as leading and also as containing an assumption. The man so testified and said he didn't know—it might have come from some books and might have come from some memorandums he had in his possession. I think the question is very leading.

The Court: Let me have the question. [558]

(Question read.)

The Court: Objection overruled. Answer the question.

A. I thought I answered that question.

(Question read.)

A. It was made from some records in my possession, just where I don't know. That is a copy—

Q. I—

Mr. Gillen: Just a minute—he hasn't finished his answer.

Q. Did you finish your answer?

(Testimony of George E. Simmons.)

A. That is a copy, a memorandum, as I said before, it was made up for one of the field auditors. Whether or not this is correct, I can't remember now.

Q. I am trying to find out from you what you made it up from.

Mr. Gillen: Objected to as asked and answered. He says he doesn't know, it might have been made up from some books, might have been made up from memorandums in his possession.

The Court: I think we have covered that ground.

Mr. Campbell: I offer in evidence Exhibit 93 for identification.

Mr. Gillen: To which we offer an objection, may it please the Court. I would like to see the document. I would like to examine this gentleman on voir dire.

The Court: You may.

Q. (By Mr. Gillen): Mr. Simmons, this document, this photostatic [559] exhibit, which contains four photostatic pages which have been designated thus far prosecution's Exhibit 93 for identification, has written on it in what appears to be ink, "Office copy." Do you recognize the printing?

A. Yes, my handwriting.

Q. Now what became of the original of this?

A. I wouldn't have the least idea.

Q. Did you ever deliver it to anyone, the original of this? Did you retain it as your office copy?

A. I don't know, sir.

(Testimony of George E. Simmons.)

Q. Now you mentioned that you made this up for a field agent.

A. A field auditor for the government.

Q. What do you mean by field auditor for the government?

A. Internal Revenue auditor, comes in and makes audit of the taxpayer's books.

Q. Do you recall how long after the year 1944 this was made up?

A. Probably 1946 or early part of '47, I don't remember; probably '46.

Q. Two or three years later? A. Yes, sir.

Q. And you do recognize the printing on this copy as your printing? A. Yes, sir.

Q. And that is something that you have retained, is it, in your office, or did you turn that over to the government? [560]

A. The original from which this was made was retained in my office. This has no signatures on it, so it is simply an office copy.

Q. You mean the four sheets from which these figures were made were retained in your office?

A. Yes.

Q. And what happened to the original of this, the original document?

A. That document was turned over to the Revenue Department.

Q. And when?

A. Some time in late 1946 or '47.

Q. And to whom particularly, do you recall?

(Testimony of George E. Simmons.)

A. No, sir, I do not. One of the two revenue officers.

Q. You don't know the name of the men?

A. Mr. Farley or Mr. Gould, I don't remember which.

Q. Now do you know how the prosecution got a photograph of your office copy that was retained by you?

A. Possibly I didn't make myself clear. This copy was made up and given to the revenue agent.

Q. Yes?

A. And he made the photostatic copy evidently.

Q. Let us see if we understand each other. Did you make two copies of this?

A. I had one original copy in the office and I made up another and marked it "Office Copy" and gave it to the revenue agent. [561]

Q. You marked the one you gave to the revenue agent "Office Copy"? A. Yes, sir.

Q. And you retained the original?

A. Yes.

Q. Do you have that now? A. No, sir.

Q. Did the original copy contain anybody's signature? A. That I can't recall.

Q. Did you sign it?

A. I signed that one, yes, sir. I signed it as having prepared that copy.

Q. Was anybody else's signature on the original that you retained? Any taxpayer's signature?

A. I don't think so. It doesn't indicate so there.

Q. Will you tell us why it was that you gave the

(Testimony of George E. Simmons.)

office copy rather than the original to the field auditor?

A. As I remember, he asked for a copy.

Q. He asked for a copy? A. For a copy.

Q. Was this return ever made? Was it ever filed? A. That I don't know, sir.

Mr. Gillen: I think, may it please the Court, that I will have to offer the objection that this document, this exhibit, is something that was prepared by Mr. Simmons, as he has [562] related, from data or under circumstances that he doesn't now recall and that it was never presented to or signed by anybody so far as his knowledge is concerned, except he signed it as the one who prepared it, and that he gave an office copy to a field auditor for the government and retained the original and so far as he knows, the original was never filed and so, of course, it couldn't be binding on anybody. In other words, if I may make myself clear, from this testimony, suppose somebody comes to my bookkeeper and says, make up some data, and he makes it up and gives it to him and I never see what he made up, I never sign it, I never return it as any declaration against my interest, so it can not be binding certainly on this defendant, whose name does not appear there on the document itself.

Mr. Campbell: Yes, it does, under schedule I.

Mr. Gillen: I mean it doesn't appear as returned. I would like your Honor to see this document. *

Mr. Campbell: I wish to be heard. As your

(Testimony of George E. Simmons.)

Honor examines it, I particularly direct your attention to Schedule I, as set forth as partnership distributive shares.

The Court: I would be glad to hear from you, Mr. Campbell.

Mr. Campbell: I wish to point out to your Honor that this document was prepared by this witness in the course of his employment as book-keeper for that particular organization, as well as the other organization. He testified that it was prepared [563] from memorandum or books which he had in his possession as a result of that employment, and I think counsel's objection actually goes to the weight of the document rather than to its admissibility. We are forced, of course, to rely upon secondary evidence here because the witness has put all his original books of account in the hands of his employers.

Mr. Gillen: May I be heard further?

The Court: Yes.

Mr. Gillen: In the first place we must recall that this witness has stated that he was employed by Pechart and Kessel and that in the course of the employment with Pechart and Kessel that he kept some books for certain organizations in which they were interested. He stated definitely and emphatically and unequivocally that he had never done any work for the defendant here and had never discussed the matter with him. Here we have something that is in the form of a return, may it please the Court, and if it was ever filed as a return, the origi-

(Testimony of George E. Simmons.)

nal should be in the hands of the prosecution and it should be produced here, but since it is not produced here, we must assume that that was never filed as a return, but was some data made up on form of return some two years later; that the partnership never signed it as a return, either for themselves or for the partnership and it is just some data that is made up from whatever it was—Mr. Simmons is very sketchy about it. Certainly that would not be binding upon the defendant in [564] this case and I do not think the proper foundation is laid. Maybe they can do it, or maybe they can produce the original return, if it was ever filed, but I think it is without foundation and should not be received by your Honor at this time.

Mr. Campbell: We do not contend that this document was filed as a return, but this is a document that was prepared by this man in the course of his duties as a bookkeeper.

Mr. Gillen: Not for this defendant.

Mr. Campbell: The evidence here shows that the defendant claimed to have and reported income from those concerns as a partner in those stores. The other documents here in evidence show that he is a partner in this organization.

The Court: That is the thought I have, Mr. Gillen, while this witness' testimony alone might not show any relationship, other evidence we have had does. The document will be admitted in evidence.

Mr. Gillen: It doesn't indicate, may it please the

(Testimony of George E. Simmons.)

Court, it is form of return that was prepared even for the partnership.

The Court: But it constitutes a summation of records.

Mr. Gillen: If it was filed for the partnership, I would say it had some dignity and your Honor should consider it, but it has not been filed as a partnership return, may it please the Court.

The Court: Well, it is admitted in evidence, Exhibit 93.

Mr. Campbell: If I may read briefly from this exhibit. [565]

The Court: Yes, sir.

Mr. Gillen: Before counsel reads, may I ask counsel, through the Court, whether or not the government is in possession of that document in its original form, whether or not that document was ever filed as a return for the partnership? If it is, then secondary evidence should not be introduced here. Primary evidence would, of course, be the best evidence.

The Court: Do you desire to answer the question?

Mr. Campbell: Yes, I have no objection. As previously stated, the government does not contend, in fact states that this document was never filed as a return, and I further state that this is the best evidence in our possession of the contents of the document.

Mr. Gillen: It certainly is not binding on the defendant. This man wasn't even working for the defendant.

(Testimony of George E. Simmons.)

The Court: I think we had better let the matter rest where it is now. Admitted in evidence.

Mr. Campbell: This is Exhibit 93. Is on form of return for partnership income, 1944. (Reads from exhibit.) Reading from Schedule I, "Partner's Shares of Income and Credits" (Reads) Making a total of \$48,956.76.

Q. Mr. Simmons, I am going to show you government's Exhibit 55, a 1945 partnership return of income of J. Billington, doing business as the 21 Club and San Diego Social Club, and ask you whether or not you prepared that return in the course of [566] your employment?

A. It was prepared in my office by one of my associates, under my direction.

Q. By whom was the actual preparation done?

A. Mr. Beck.

Q. Was that return prepared under your direction and supervision? A. Yes, sir.

Q. Will you state whether or not it was prepared from books and records which you maintained in the course of your employment?

A. Yes, sir.

Q. I will call your attention to the fact that on the face this return states as being for both the 21 and San Diego Social Club? A. Yes, sir.

Q. Were the two operations combined for the purpose of that return?

A. Yes, sir, physically and for the return both.

Q. I show you government's Exhibit 56, being the 1943 return of Joseph E. Billington, and ask

(Testimony of George E. Simmons.)

you whether or not you prepared that return?

A. Yes, sir.

Q. And was that also prepared in the course of your employment? A. Yes, sir. [567]

Q. I show you government's Exhibit 72A, being the partnership return of Frank Carvani, doing business as the 21 Club, for the year 1944, and ask you whether or not you prepared that return?

A. Yes, sir.

Q. Was that also prepared from the books which you kept in the course of your employment?

A. That is a '43 return?

Q. '44 return. A. Yes, sir.

Q. Now, Mr. Simmons, you stated that you kept books also for the 311 Club? A. Yes, sir.

Q. Where was that located?

A. 311 Panhandle Boulevard, El Cerrito.

Q. And in the course of your employment in that connection did you prepare partnership returns of income for the years 1944, 1945, and 1946?

A. I don't remember, but I believe I did.

Q. I show you government's Exhibits 74, 75 and 76 and ask you if you prepared those returns in the course of your employment, being partnership returns for the 311 Club for 1944, 1945 and 1946?

A. I personally prepared 1944 and 1946. 1945 was prepared by Mr. Beck under my supervision. [568]

Q. And were all three of those returns prepared from the books maintained by you in the course of your employment? A. Yes, sir.

(Testimony of George E. Simmons.)

Q. Now what was the nature of the business of the 311 Club during those years?

A. Gambling.

Q. In the course of your employment, did you have occasion to visit the premises of the 311 Club from time to time? A. Yes, sir.

Q. What was the nature of the gambling carried on there during those years, to your observation?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: I do not believe it is material.

Mr. Campbell: I did not ask that question as to the preceding clubs, your Honor, but I do think it becomes material as to this particular one.

The Court: Well, we will sustain the objection for the present. We will see if anything develops which appears to make it material—we will consider the matter again. I can't see where it is material at this time.

Mr. Campbell: Very well.

Q. Was that the only business of the 311 Club?

A. As far as I know, sir. [569]

Q. There was no bar or restaurant in connection with it, is that correct?

A. Not the 211 Club itself, no, sir.

Q. Now were the books of the 311 Club among those which you returned to your former employers at the time you severed your connection?

A. Yes, sir.

Q. I believe you stated you returned them to Mr. Pechart and Mr. Kessel, is that correct?

(Testimony of George E. Simmons.)

A. Either one of the two or both.

Q. Do you have in your possession any record of any kind with reference to the operation of the 311 Club during the years 1944 to 1946 inclusive?

A. No, sir.

Q. Will you describe the books which were maintained for the 311 Club?

A. Simple cash receipts and disbursements.

Q. You have set those up for each year on a partnership return of income. Were investment accounts set up in those books for each of the partners?

A. There were no real books of the company, simply cash and disbursements.

Q. And they were the only books maintained?

A. Yes, sir.

Q. So there was not a complete set of books, I take it? [570] A. Not a ledger book.

Mr. Gillen: I move to strike the comment of counsel. He said there was not a complete set of books, as his characterization. It might be a complete set of books so far as the books that were maintained is concerned.

The Court: The remark may stand as part of the question.

Mr. Campbell: Yes, I did not mean it as a side remark.

Q. Did the same situation prevail so far as the San Diego Social Club and 21 Club were concerned?

Mr. Gillen: Objected to as calling for opinion

(Testimony of George E. Simmons.)
and conclusion and his own characterization; the same situation prevail.

Mr. Campbell: I will withdraw the question and approach it in a different manner.

Q. What books of account were maintained for the 21 Club?

A. There was a general ledger for the 21 Club, made up by my predecessor.

Q. To whom do you refer?

A. Mr. Bishop.

Q. And did you continue to maintain that general ledger after you took over?

A. When I took over it was about seven or eight months behind. We endeavored to keep on as we could. I doubt if it was ever up to date.

Q. I was going to ask was it ever brought up to date during [571] that period of time?

A. I hardly think so.

Q. This is during the years 1944 to 1946, inclusive?
A. That's right.

Q. Now what books of account were maintained for the San Diego Social Club?

A. Cash receipts and disbursements.

Q. Was any general ledger maintained for that organization?
A. No, sir.

Q. Now when you refer to the fact that a book of cash receipts and disbursements were kept regarding the San Diego Social Club, will you state the nature of the entries that you made in that book?

A. The daily record of receipts would be

(Testimony of George E. Simmons.)

brought over to my office by whoever happened to be available and each day's activities they would show gain or loss for the day, which was entered in my record.

Q. Was that a written or oral memorandum which was brought to you?

A. It was a printed form, signed.

Q. And by whom would it be signed?

A. Whoever happened to be on that particular day.

Q. By whoever happened to be on, do you refer to whoever happened to be managing the business on that day?

A. That is right. Might have been Raggiota, might have been [572] Mr. Parman, might have been somebody else.

Q. In other words, what you term the operating manager? A. That is right, or the cashier.

Q. Would that slip contain more than one paper? A. No, sir.

Q. I take it then it would contain a net figure, showing the profit or loss of the operation of the gambling at the San Diego Social Club for that particular day?

Mr. Gillen: Objected to as leading and suggestive. This is direct examination.

The Court: It is a little leading and suggestive. Could you reframe that question?

Mr. Campbell: Yes, your Honor.

Q. What did that one figure purport to show, Mr. Simmons?

(Testimony of George E. Simmons.)

A. The receipts or loss for the day, insofar as what was concerned. I paid all bills which were deductions from that figure.

Q. Was a bank account maintained for the San Diego Social Club? A. Yes, sir.

Q. Where was that maintained?

A. Mechanics Bank at El Cerrito.

Q. How many accounts were maintained there for the San Diego Social Club?

A. Covered five or six different operations.

Q. Do I understand there was one account or five or six [573] different accounts?

A. Five or six accounts. Each activity had its own bank accounts.

Q. Will you state what those were?

A. I don't understand the question.

Q. Well, how the bank accounts were divided?

A. Each separate—San Diego Social Club, 21 Club, 311 Club.

Q. But there was only one account for the San Diego Social Club?

A. No, two accounts, one was simply pay roll account, then there would be the main bank account. The pay roll account was taken out of the main account at the bank, as is the usual practice.

Q. Now who were the authorized signators on those accounts?

A. Well, for the San Diego Social Club, for the gambling, probably have Mr. Billington—

Mr. Gillen: Just a moment. I am going to offer

(Testimony of George E. Simmons.)

an objection to such speculation—"would probably have."

The Court: I think the witness should answer from his own knowledge if he can or without any uncertainty if he can. If he can't answer the question, say you don't know.

Mr. Gillen: Or if the records of the bank accounts are available, they should be produced as the best evidence.

The Court: That answer will go out. We will have the [574] question read. Answer the question directly. If you do not know, say so.

(Question read.)

A. I do not remember on general accounts. On pay roll accounts I or my brother Lester were authorized to sign those pay roll checks.

Q. Were you authorized to draw on the general accounts? A. No, sir.

Q. Of any of the three clubs? A. No, sir.

Q. Now with regard to the 21 Club, you stated that you had a general ledger. Now was there set up in that general ledger investment accounts for each of the partners?

Mr. Gillen: Objected to as leading and suggestive. I think it would be proper to ask what was set up.

The Court: Objection will be overruled.

Mr. Gillen: It is similar to the question that your Honor ruled upon in regard to 311 Club.

The Court: Just a little different.

(Testimony of George E. Simmons.)

A. I don't know.

Q. You don't know? A. No, sir.

Q. Did you keep those records?

A. They were kept by Mr. Bishop.

Q. After you began your employment, I believe you stated in [575] 1944, did you maintain any such accounts? A. Not to my knowledge.

Q. Did you maintain any such accounts, that is, partners accounts, on any of the three clubs, that is to say the 21 Club, the San Diego Social Club or the 311 Club, to which reference has been made?

A. No books were kept except the Internal Revenue report showing the distribution.

Q. What was the source from which you obtained the distribution of profits or loss at the end of each year?

Mr. Gillen: Objected to as asked and answered. He said he kept daily reports from whoever happened to be in charge and in addition, because he paid the bills himself, he knew what other deductions were to be made for current bills.

The Court: Objection overruled. Answer the question.

Q. Do you understand the question?

A. No, may I have the last question?

(Question read.)

A. Messrs. Pechart and Kessel, either one or both.

Q. And was that true of each of the three clubs?

A. Yes, sir.

(Testimony of George E. Simmons.)

Q. Taking, for example, government's Exhibit 54, the 1944 partnership return of income of Joseph Billington, doing business as the 21 Club, and calling your attention to Schedule I, where the reported profit of 3799 and some odd cents is [576] divided \$1800 to Remmer, \$900 each to Kessel and Pechart, and \$190 to Mr. Billington, do I understand that the information from which you put those figures down there was given to you by Mr. Pechart and Mr. Kessel?

A. Not Joseph Billington, no, sir.

Q. From what source did you get the information in that return?

A. Both Billington and Pechart themselves.

Q. That is to say from all three?

A. Yes, sir, to the best of my knowledge.

Q. Calling your attention to government's Exhibit 93, the office copy which was never filed, I believe you stated, of 1944, of Joseph Billington, doing business as the San Diego Social Club, and dividing the 48 thousand dollar profit set out here as among eight or nine individuals—

Mr. Gillen: Just a minute—may it please the Court I think you misquoted the record in your question. I do not think this witness did state that was never filed as a return. He stated he did not know. Mr. Campbell stated it was not.

Mr. Campbell: Yes, I so state. I will reframe my question.

Q. Calling your attention to plaintiff's 93, the office copy of 1944, of 1944 purported partnership

(Testimony of George E. Simmons.)
return of income, for Joseph Billington, doing business as San Diego Social Club, wherein some \$48,900 of profit is divided among some eight [577] or individuals, from what source did you obtain the information as to the division to be made of that profit among those individuals?

A. If I may go back just a moment. It was rather hard to determine who owned that and which. It was my understanding these people were all partners—

Mr. Gillen: Just a minute—

Mr. Campbell: Counsel is right.

The Court: That may go out as not responsive.

Q. You must answer my question directly, Mr. Simmons.

The Court: Just answer the question.

(Question read.)

Mr. Gillen: Just a moment—I am going to offer several objections. In the first place, I offer the objection this question was asked and answered some time ago on direct examination. The gentleman does not know, he thought, to the best of his recollection, he obtained the information that he put in that exhibit either from some books or from some memorandum he had and that is as far as he went on that. My next objection is that it is not shown to be a return for the reason that this witness testified that it was something that he prepared for a field auditor for the Internal Revenue Department, who asked him for a copy, and finally counsel's question

(Testimony of George E. Simmons.)

contemplates that there was such a division of profits as was shown in there, which is not the fact. There is not anything [578] on that. He said he prepared some statement for a field auditor from some information he may have gotten from books or from some memorandum and he doesn't know whether that was ever filed as a return or not, so there is no evidence in the record at all that there was ever any distribution to anybody that is mentioned in there.

The Court: Let me have the question again.

(Question read.)

The Court: Objection overruled. Answer the question.

A. I don't know, sir.

(Jury and alternate jurors admonished and short recess taken at 3:00 o'clock.)

3:15 p.m.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SIMMONS

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Simmons, I call your attention to the fact that on the three returns of the 311 Club, being

(Testimony of George E. Simmons.)

plaintiff's Exhibits 74, 75 and 76 respectively, there is named at the top of the return W. M. Pechart, D. N. Kessel and Fred Grunewald, doing business as 311 Club. Who is Fred Grunewald?

A. Fred Grunewald is the owner of the building in which the 311 Club is located.

Q. I also notice in respect to the 1944 return of Billington, [579] doing business as the 21 Club, plaintiff's Exhibit 54, there is attached as a part of the return an agreement between Walter M. Pechart and David N. Kessel, partners, and Fred Grunewald. Did he have any connection with that club, the 21 Club?

A. No, sir. The agreement is attached to the wrong form.

Q. By wrong form, to what form should that have been attached? A. The 311 Club.

Q. That was attached there by you at the time you made it up?

A. I don't know, sir. Probably stapled to the wrong return.

Q. Now with respect to any of the three organizations, that is, the 311 Club, the San Diego Social Club, or the 21 Club, did you ever see any partnership agreements?

A. No, sir, outside the 311 to which that memorandum refers.

Q. By memorandum you refer to the memorandum which is stapled to government's Exhibit 54, is that correct? A. Yes, sir.

Q. Which you say should have been stapled to

the return of the 311 Club? A. Yes, sir.

Q. And that is the only agreement that you have seen among any of the parties? A. Yes, sir.

Q. And as I recall, you prepared both the 21 Club return, Exhibit 54, to which that is attached, and the 311 Club, Exhibit [580] 74, is that correct?

A. Yes, sir.

Q. To which you said it should have been attached? A. Yes, sir.

Q. Do you recall the circumstances under which it was attached to Exhibit 54?

A. Probably a clerical error before the returns were sent in.

Mr. Campbell: I see. You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Simmons, during the years 1944, 1945, and 1946, who were your employers in connection with the three clubs that have been mentioned here, the 311 Club, 21 Club and San Diego Social Club?

A. Messrs. Pechart and Kessel.

Q. Did you ever make an individual return for Elmer F. Remmer, the defendant here, or for his wife, or for either of them? A. No, sir.

Q. By the way, I take it that your organization was an independent organization of public accounts, is that correct?

A. No, sir, we were paid individuals by Pechart and Kessel.

Q. I mean you had your own organization, they were not the only people that you kept books for?

(Testimony of George E. Simmons.)

A. No, we had others.

Q. So you had your own organization, but Pechart and Kessel employed you to keep books for those three enterprises? [581] A. Yes, sir.

Q. Now I will ask you to look at defendant's Exhibits F and G and I am going to ask you whether you recall receiving either or both of these letters from Mr. Pat Mooney, inquiring of you concerning any distributive share out of the 21 Club or the San Diego Social Club for Elmer Remmer?

Mr. Campbell: For what year does that refer?

Mr. Gillen: 1944.

Q. Do you recall receiving those letters, sir?

A. I do not recall whether these were the letters. I received one or two letters from Mr. Mooney similar to these.

Q. You recall that Mr. Mooney wrote you on May 23, 1945, and requested as follows:

"Will you please let me know the amount of the distributive share of Mr. Elmer F. Remmer partnership return for the 21 Club in El Cerrito for the year 1944? We have to have these figures as I may have to file an amended income tax return 1040. Thanking you for your prompt attention in this matter. I might add that I was in your office about a year ago with Mr. Willie Kyne. With the writer's kindest personal regards. Sincerely, Pat Mooney, Chief Field Agent."

Do you recall a letter similar to that coming to you?

(Testimony of George E. Simmons.)

A. Yes, sir. [582]

Q. Now do you recall whether or not you ever answered that letter? A. I did.

Q. And do you recall what you said in that letter? A. No, sir.

Q. Let me ask you if you recall whether or not you advised Mr. Mooney that you did not have that data at hand, that it might be in the possession of Mr. Lewis, who was former collector of Internal Revenue at San Francisco?

A. I do not remember, sir.

Q. Let me ask you to look then at defendant's Exhibit G and see if this refreshes your recollection. It is another letter on May 7, 1946, from Mr. Mooney to you.

A. I probably received this or a similar letter.

Q. Now, Mr. Simmons, does this refresh your recollection that you referred Mr. Mooney to Mr. Lewis at 333 Montgomery Street, San Francisco?

A. I don't think so.

Q. Let me read this to you:

"May 10, 1946. Dear Mr. Simmons: I was unable to get Mr. Lewis at 333 Montgomery Street, San Francisco, regarding the partnership returns of Elmer F. Remmer for the 21 Club in El Cerrito. You may have returns in your possession at this time and no doubt you can give me the distributive [583] share of Mr. Remmer in the accounting. It is necessary to have these figures in order to complete Mr.

(Testimony of George E. Simmons.)

Remmer's return. Thanking you for your courtesy in this matter, very truly yours, Chief Field Deputy."

Does that refresh your recollection?

A. I recall the incident, but what happened I don't know.

Q. Well, let me ask you if it would refresh your recollection if you were told Mr. Pat Mooney testified here that when he inquired of you of information for any distributive net share of the partnership in the 21 Club of Elmer Remmer, that you informed him at that time that that data was out of your hands and was now in the hands of Mr. Lewis, who had formerly been the collector of Internal Revenue at San Francisco, and who had subsequently resigned from that post and had become a lawyer and tax expert at San Francisco with offices at 333 Montgomery Street. Do you recall that?

Mr. Campbell: Objected to as assuming a fact not in evidence.

Mr. Gillen: I can show counsel the records.

The Court: That seems to be my recollection.

Mr. Campbell: I will withdraw my objection.

The Court: You may answer the question. The substance of the question is, does that refresh your memory?

Mr. Gillen: Yes, your Honor. Do you have my question? [584] A. Will you repeat it?

(Question read.)

(Testimony of George E. Simmons.)

A. I recall writing Mr. Mooney. I remember that part of it, that the information was in the hands of Mr. Lewis and I didn't have it at that time.

Q. Do you know whether or not you ever furnished Mr. Mooney with any information on the distributive share of any profit out of the 21 Club that was to go or did go to Mr. Remmer?

A. I did, sir.

Q. In what form did you give him that information?

A. By letter, after discussions in my office.

Q. Was it subsequent to the last letter that he wrote you May of 1946, and I am referring now and showing you defendant's Exhibit G, in which he said he couldn't get in touch with Mr. Lewis and asked you if you now had that information?

A. Before this day I talked to Mr. Mooney. I didn't furnish anything after this date.

Q. You can see by reading that letter that Mr. Mooney still did not have the information; isn't that obvious to you?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Read the letter and see if it does not assume yet that Mr. Mooney did not have the information that he wanted and was asking if you now had it?

Mr. Campbell: Same objection. [585]

The Court: Same ruling.

Mr. Gillen: That it is argumentative?

The Court: Yes.

(Testimony of George E. Simmons.)

Mr. Campbell: That is my objection.

The Court: I think it is asking this witness for his view of the exhibit.

Mr. Gillen: All right, let me put it this way:

Q. Can you tell us if you had already given Mr. Mooney the information he wanted?

A. No, sir.

Q. So when he wrote you this letter May 19th, he didn't have it?

Mr. Campbell: Same objection, argumentative.

The Court: Same ruling.

Q. Did you write a letter to Mr. Mooney in answer to defendant's Exhibit G, in which you told Mr. Mooney you had already given him the information? A. I do not remember, sir.

Q. Well, what did you do with regard to that letter?

A. I might have written; I might have referred it to Mr. Lewis. I have no knowledge what happened after that.

Q. Isn't it a fact, Mr. Simmons, you had already referred him to Mr. Lewis and he wrote you he was unable to get Mr. Lewis and asked you if the information had come back in your hands?

Mr. Campbell: Objected to as [586] argumentative.

The Court: Same ruling. Objection sustained.

Mr. Gillen: That it is argumentative.

Q. Will you read that exhibit, Mr. Simmons, and tell us whether or not that refreshes your recollection that you had not, up to that time, given any

(Testimony of George E. Simmons.)

information to Mr. Mooney regarding any distributive share due Mr. Remmer?

Mr. Campbell: Objected to as asked and answered.

The Court: He may look at the exhibit. I think the question was to examine the instrument and determine whether or not it refreshes his memory; wasn't that the question?

Mr. Gillen: Yes, your Honor.

A. I don't know whether I ever answered this letter or not.

Q. Do you know whether you ever gave Mr. Mooney information regarding the distributive share due Mr. Remmer out of the 21 Club?

A. I remember writing Mr. Mooney one letter, giving him the distributive share of Mr. Remmer for a certain year, the year of which I don't remember.

Q. Would you say it was before this letter, defendant's Exhibit G, or after? A. Before.

Q. Before? A. Yes, sir.

Q. Did you obtain any explanation from Mr. Mooney at any time [587] as to why he wrote this letter, saying he didn't have the information, if you had already given it to him?

Mr. Campbell: Objected to as argumentative.

The Court: He can answer that yes or no.

(Question read.)

A. No, sir.

Q. Now, Mr. Simmons, I am showing you here

(Testimony of George E. Simmons.)
the prosecution's Exhibit 54, which purports to be the return for 1944 of Joseph Billington, doing business as the 21 Club, and in which it is shown that Joseph Billington had received a distributive share of the profit in the sum of \$190, and in which there appears your name and your stamp, G. E. Simmons and Associates, as the person who made up that return. You recall making that return, do you not? A. Yes, sir.

Q. And I believe your testimony, in answer to Mr. Campbell's question, was that you received the information of that distributive share in the sum of \$190 to Mr. Billington from Mr. Pechart, Mr. Kessel and Mr. Billington, himself; is that correct?

A. Yes, sir.

Q. Now the following year, to wit, 1945, your organization made up the return for J. Billington, doing business as the 21 Club and San Diego Social Club, and the return as the person who made it up was signed by R. Beck, Frank E. Simmons and Associates, and in that return it is shown that Mr. Billington received [588] \$3,658.17. Can you tell us where that information was obtained?

A. It was the distributive percentage received from Messrs. Billington, Pechart and Kessel, and this is not the share of his actual receipt. It is his proportionate share. Whether he got the money or not, I cannot tell.

Q. That is the same position that prevailed as to the \$190 the year before? A. Yes, sir.

(Testimony of George E. Simmons.)

Q. You don't know whether he got the money either? A. No, sir.

Q. But those three gentlemen, Mr. Pechart, Mr. Kessel and Mr. Billington, told you that that was his distributive share, \$190; is that correct?

A. Yes.

Q. Is that the same thing that occurred the following year when his distributive share was 3,600 odd dollars? A. Yes, sir.

Q. Did you get that information yourself from those three gentlemen? A. I don't remember.

Q. I understood you to say that you have never discussed any of these returns or the profits or the business of either of these, or any of these three enterprises, with Mr. Remmer, the defendant in this case? A. That is correct. [589]

Q. Now, Mr. Simmons, I am going to show you what has been introduced here as prosecution's Exhibit 93, and that, if you remember, is the document which you said you made up for a field auditor a year or two after 1944, or two or three years after 1944, I believe you said either 1946 or 1947, and I will ask you to note that in that exhibit the distributive share, or the distributive percentage, to Mr. Billington is set forth as two thousand dollars, while for the same year in the return that was filed by you, the distributive share for Mr. Billington was set forth as \$190, in Exhibit 54. Can you tell us how that difference arose? Both of those were prepared by you. Can you tell us the reason for that difference, namely, that 54 shows Billing-

(Testimony of George E. Simmons.)

ton was entitled to a percentage of \$190 while Exhibit 93 shows him entitled to a percentage of two thousands dollars? Can you tell us why the difference?

A. The \$190 distributive share refers to Joseph Billington doing business as the 21 Club. On this photostatic copy for Joseph Billington, doing business as the San Diego Social Club, the distributive share is two thousand dollars. They are two different entities.

Q. Two different enterprises?

A. Two different enterprises.

Q. So then that Exhibit 93 has nothing to do with the 21 Club at all? A. No, sir. [590]

Q. Now again referring to Exhibit 54, prosecution's Exhibit 54, which is the Joseph Billington return for the 21 Club in 1944, which, if I understand your testimony correctly, that this two-page agreement that appears attached hereto, mentioning some terms of agreement between Pechart and Kessel and a man named Grunewald, was attached to this return inadvertently? A. Yes, sir.

Q. That did really belong to the 311 Club?

A. Yes, sir.

Q. Because Mr. Grunewald was the owner of the building in which the 311 Club was housed and Mr. Grunewald had nothing to do with the 21 Club and the San Diego Social Club; is that correct?

A. Yes, sir.

Q. It was mere inadvertence?

A. Mere inadvertence, that's right.

(Testimony of George E. Simmons.)

Q. Now in prosecution's Exhibit 72A, you made a return for the year 1944 for one Frank Carvani; you recall that return? A. Yes, sir.

Q. Mr. Simmons, isn't it a fact that Frank Carvani never did actually manage the 21 Club, but that his name had initially appeared on the license and that he was supplanted by another person because of the death of somebody that was running an enterprise in San Francisco?

A. My recollection is Frank Carvani, as far as we were concerned, from the heading on the books of account— [591]

Q. (Interrupting): Well, let me ask you this, do you recall—

Mr. Campbell: I don't think he finished his answer.

A. (Continuing): —but when we tried to find Frank Carvani, he was very seldom available. Perhaps we saw him three times during that interval.

Q. Was it within your knowledge that Mr. Frank Carvani was conducting another enterprise altogether in San Francisco?

A. I didn't know anything about that.

Q. Does it refresh your recollection, Mr. Simmons, that you called upon Frank Carvani to make a return because Frank Carvani's name had been initially on the license; does that refresh your recollection? A. That I do not remember.

Q. Mr. Bishop, whom you have mentioned here as your predecessor on this account, did he work for Mr. Pechart and Mr. Kessel also?

(Testimony of George E. Simmons.)

A. Yes, sir.

Q. And he was the man who had set up the ledger on the general account for the 21 Club?

A. Yes, sir.

Q. And you found it when you took over?

A. Yes, sir.

Q. And you found it to be somewhat behind?

A. Yes, sir.

Q. And hadn't been kept up to date? [592]

A. Yes, sir.

Q. Mr. Bishop had been lax—

Mr. Campbell: I am going to object to that, as calling for conclusion of the witness.

Q. Well, let me put it this way—that indicated to you a laxity on the part of the man who is keeping the books, rather than on the part of the people who employed him; is that correct?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Q. Well, did you ever talk this account over with Mr. Bishop?

A. Quite frequently. Mr. Bishop was ill the biggest part of the time.

Q. Did Mr. Bishop tell *you had* fallen behind on the bookkeeping?

Mr. Campbell: Objected to that as calling for hearsay.

The Court: Objection sustained.

Q. Well, at all events, you did the best you could to bring the books up to date? A. Yes, sir.

Q. And you didn't have any difficulty in getting

(Testimony of George E. Simmons.)

hold of people who assisted you in bringing the books up to date?

A. During those times it was hard to get competent help. I had only my brother and I and one man.

Q. I mean you were able to get the information you needed to bring the books up to date and you did it as best you could with your staff; is that correct? [593] A. Yes, sir.

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. Mr. Simmons, reference has been made here particularly in some correspondence that was purportedly between you and Mr. Mooney and this gentleman, Mr. Lewis, a former collector at San Francisco. Was Mr. Lewis collector of Internal Revenue during the years that you were keeping these books? A. No, sir.

Q. As a matter of fact, he had not been collector since 1938, had he?

Mr. Gillen: We will stipulate he was not collector but was in private practice, both as a lawyer and tax expert.

The Court: You accept that stipulation?

Mr. Campbell: Yes, I accept that stipulation. That's all.

(Witness finally excused.)

LESTER SIMMONS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

- Q. Will you state your name, please?
- A. Lester E. Simmons.
- Q. Where do you reside?
- A. 806 Liberty Avenue, El Cerrito.
- Q. What is your business or occupation?
- A. Accountant. [594]
- Q. With whom are you associated at this time?
- A. Pechart and Kessel.
- Q. During the years 1944 to 1946 were you associated with Mr. Pechart and Mr. Kessel?
- A. 1945 and '46.
- Q. Were you also at that time associated with your brother? A. I was.
- Q. Your brother testified that he severed his connection with Pechart and Kessel late in 1946 or early in 1947. Are you able to fix that date with any greater certainty?
- A. I believe it was '48.
- Q. It wasn't until 1947. I take it that after he severed his connection, you remained on; is that correct? A. That's right.
- Q. Now during the years 1944, 1945 and 1946, were you working under your brother's supervision or independently?
- A. The year 1944 is not involved. I was not in California at that time.

(Testimony of Lester Simmons.)

Q. But after you came here?

A. I worked for him.

Q. Was that the same thing during the year 1946? A. Yes, sir.

Q. Now a subpoena duces tecum was served upon you, Mr. Simmons, to produce all records of any description for the period January 1, 1943, to January 31, 1947, inclusive, relating to the [595] following businesses: 21 Club, San Diego Social Club, and 311 Club, all at El Cerrito, California; is that correct? A. Yes, sir.

Q. Do you have such records? A. No, sir.

Q. Do you have any records of any kind in your possession? A. I have no records.

Q. Do you have any work papers for that period in your possession? A. No, sir.

Q. Where are such records, if you know?

A. Mr. Remmer has them.

Q. When were they delivered to Mr. Remmer?

A. Some time in April, 1951.

Q. And who made the delivery to Mr. Remmer?

A. Well, Mr. Remmer picked them up at the Pechart office.

Q. Were you there on that occasion?

A. Yes, sir.

Q. You say it was in April of 1951?

A. That's right.

Q. And so far as you know, have they been in Mr. Remmer's possession at all times since then?

Mr. Gillen: Objected to as calling for conclusion.

Mr. Campbell: I will withdraw that question.

(Testimony of Lester Simmons.)

Q. Since April, 1951, when Mr. Remmer picked up these records, [596] that are called for in this subpoena, that is to say, the records of the 21 Club, San Diego Social Club, and the 311 Club, have you seen them since that time? A. I have not.

Q. Who was present on that occasion when Mr. Remmer picked these records up? A. Myself.

Q. And who else? A. No one.

Q. Mr. Remmer was there, I take it?

A. Naturally.

Q. And Mr. Pechart? A. No.

Q. Had you previous to that time been given instructions by anyone to turn those records over to Mr. Remmer?

A. Mr. Remmer requested the records and Mr. Pechart approved it.

Q. Mr. Pechart approved it? A. Yes, sir.

Q. At the time that those records were turned over to Mr. Remmer, did you obtain a receipt for them? A. Yes, sir.

Q. Do you have that receipt?

A. Mr. Pechart has it.

Q. Do you know if he has that here with [597] him? A. He is not here.

Q. I mean to say, did he bring it here to court with him? A. I think he did.

Mr. Campbell: If the Court please, may the further examination of this witness be deferred until 10:00 o'clock tomorrow morning until the other matter has been determined?

The Court: Yes, we will take our recess at this time.

Mr. Gillen: Before your Honor excuses the jury, may I make a statement that your Honor said you would permit me to make?

The Court: Yes, sir.

Mr. Gillen: In the absence of the jury on Friday, your Honor called for some comment regarding the problem that confronted the Court at that time, with reference to the appearance on the witness stand of Mr. Kessel. At that time I stated to your Honor, and wish to reiterate, with your Honor's permission, in the presence of the jury, that Mr. Kessel, and since that time Mr. Pechart, are both witnesses subpoenaed by the prosecution, by the government, and their attitude and their decision regarding whether or not they desire to testify in this matter is something that rests entirely with them on the advice of independent counsel. They were accompanied from San Francisco by Mr. Chas. Wiseman as counsel, and also represented here this morning by Joseph P. Haller, a Nevada attorney, with offices in Reno, and it is the desire of the [598] defense that your Honor should know, and the jury should know, that their decisions and determination what they should do in the face of any orders your Honor makes, is entirely their decision and that the defense is not in any wise participating in this matter. I might say to your Honor that it has been the contemplated thought of the defense in this case to call Mr. Pechart and Mr. Kessel as defense witnesses—

Mr. Campbell: Just a minute.

Mr. Gillen: The Court said I could make a statement. If the Court thinks I am making an improper statement, he is well able of advising—

The Court: I do not think we should go into matters of what the defense contemplates. I think the substance of the statement made the other day to the Court in the absence of the jury is pretty well covered.

Mr. Gillen: If your Honor feels so.

The Court: I think so. No need to go any further at this time. The record will show and the jury will understand the position of the defendant, as stated just now by Mr. Gillen. So the jury is excused until 11:00 o'clock tomorrow.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [599]

December 11, 1951—2:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

The Court: Proceed.

DAVID N. KESSEL

a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Mr. Kessel, I am going to repeat to you the question which was asked you yesterday. Do you know Mr. Remmer's occupation?

(Testimony of David N. Kessel.)

A. I decline to answer. It would tend to incriminate me.

Q. On what grounds?

A. On the grounds it may incriminate me.

Mr. Campbell: I press the question, your Honor.

The Court: That question was propounded to the witness on Friday and yesterday, Monday, December 10, 1951, and the same response was made. The defendant declined to answer then on the ground that the answer would tend to incriminate him. Thereupon the matter was continued until this morning at 10:00 o'clock. The Court at that time heard from counsel for the witness legal argument in behalf of the witness' position and also received certain exhibits in evidence. At the conclusion of the morning session I indicated that I would order the witness to answer the question, so I will now order the witness to [600] answer the question which was propounded by Mr. Campbell. Will you please read the question to the witness again?

(Question read.)

A. At the present time I do not know.

Q. Do you know what his occupation was during the years 1944 to 1946, inclusive?

A. I decline to answer the question.

Mr. Campbell: I press the question, your Honor.

The Court: What is your reason for declining to answer?

Mr. Campbell: I think, your Honor, if it is the

(Testimony of David N. Kessel.)

same reason in each instance, that it may be deemed to have been stated.

The Witness: Yes.

The Court: Same reason. Does counsel for the witness desire to have any further presentation in regard to the present situation?

Mr. Wiseman: No, your Honor.

The Court: I give counsel for the witness an opportunity to be heard if they so desire and they may make any showing that they might desire.

Mr. Wiseman: Do I understand, your Honor, there has been an order or direction made by the Court?

The Court: I think the question was merely propounded and the witness has refused to [601] answer.

Mr. Wiseman: I presume there has been no order?

The Court: No order made.

Mr. Wiseman: I assume our understanding was there would be an order made in respect to the question.

The Court: No, I do not know what the situation might be. I cannot contemplate the questions that may be propounded.

Mr. Wiseman: As I understand, with respect to each particular question it would be considered by the Court before he orders and order and direction be given.

The Court: So I will now direct the witness to answer the question just propounded by Mr. Camp-

(Testimony of David N. Kessel.)

bell. Please read the question again to the witness.

(Question read.)

A. Cafe business and gaming.

Q. Where, if you know, was that business conducted by Mr. Remmer?

A. I refuse to answer that question.

The Court: The Court will order and direct the witness to answer the question.

A. That was at the 21 Club, and San Diego Social Club.

Q. Where were the 21 Club and San Diego Social Clubs located?

A. Somewhere on Panhandle Boulevard.

Q. Were they at Panhandle Boulevard and San Diego Street or Avenue in El Cerrito? [602]

A. Yes, sir.

Q. Do you know the amount of Mr. Remmer's investment in those enterprises during the years 1944 to 1946, inclusive?

A. I refuse to answer that question.

Mr. Campbell: I press the question, your Honor.

The Court: The Court will direct the witness to answer the question.

A. Mr. Remmer owned the property. I don't know how much he had invested. He never took an active interest in the business.

Q. Do you know who the bookkeeper or bookkeepers were for those businesses, that is, the 21 Club and San Diego Social Club, during the years 1944 to 1946?

(Testimony of David N. Kessel.)

A. I think we had Mr. Simmons, the two Simmons accountants.

Q. Is that the George Simmons who appeared on the stand here yesterday? A. Yes, sir.

Q. Who employed Mr. Simmons for that purpose? A. The Club employed him.

Q. By the Club, to what individual or individuals do you refer?

A. I had 25 per cent, Mr. Pechart had 25 per cent, Mr. Remmer had 50 per cent. He was paid to keep the books.

Q. Was that division of 50 per cent to Mr. Remmer applicable to both the 21 Club and the San Diego Social Club?

A. It was sort of a combined interest. One was a cafe and [603] one was a gaming house; one was called the San Diego Social Club and one was called the 21 Club. The San Diego Social Club was the gaming house and the 21 Club was the bar and restaurant.

Q. They were both housed under the same roof?

A. Yes.

Q. Are you acquainted with one Joseph Billington, sometimes known as Frankie Denny?

A. I decline to answer the question.

The Court: The Court directs and orders you to answer the question.

A. Yes, I do know Mr. Denny.

Q. Under what name did you know him during the years 1944 to 1946?

A. Under the name of Joseph Billington.

(Testimony of David N. Kessel.)

Q. To your knowledge did he have some connection with the 21 Club and San Diego Social Club?

A. I refuse to answer that question.

The Court: The Court directs you to answer the question, Mr. Kessel.

A. He had a job there. He was no partner in the business. He just had a job.

Q. What was the nature of his job?

A. Well, he took care of the bar and the restaurant.

Q. And what, if you know, was he paid for his services in that connection? [604]

A. I think he got about seventy-five a week and bonus; about seventy-five.

Q. You say he was not a partner in the venture?

A. Not a partner.

Q. Did you know one Frank Cavani during the years 1944 to 1946?

A. I refuse to answer the question.

The Court: The Court directs you to answer the question, sir.

A. Yes, I do know Mr. Cavani.

Q. Did he have some connection with the 21 Club and San Diego Social Club during that period?

A. The only thing I knew about him, the license was in his name at one time.

Q. Did he have anything to do with the operation of either of the clubs? A. No, sir.

Q. Nor was he a partner in the operation of the club?

A. Just simply a name only on the license.

(Testimony of David N. Kessel.)

Q. Who is Frank Cavani?

A. I didn't know him very well.

Q. Where does he live?

A. Well, he lives in San Francisco.

Q. By license are you referring to liquor licenses? A. Liquor license. [605]

Q. And when was that put in his name, if you know?

A. I wouldn't remember, but I believe he was the first man named on the license when the club opened.

Q. And during the period in question, 1944 to 1946, was the license continued in his name?

A. I wouldn't be sure. I think it was changed to Billington. I wouldn't be sure.

Q. Were you in 1944 acquainted with Walter Parman? A. I refuse to answer that.

The Court: The Court will order and direct you to answer the question, Mr. Kessel.

A. I know a Walter Parman.

Q. To your knowledge did he have any connection with the operation of the 21 Club or the San Diego Social Club? A. Just worked there.

Q. What was the nature of his employment?

A. He was sort of a manager in the gaming room.

Q. Did he have any interest in the operation of the establishment? A. Not that I know of.

Q. Were you, during 1944, acquainted with one A. Riggardio, sometimes known as Tony Riggardio?

(Testimony of David N. Kessel.)

A. I refuse to answer the question.

The Court: The Court will direct and order you to answer the question, Mr. Kessel. [606]

A. He also worked at the 21 Club.

Q. What was the nature of his employment?

A. He also helped out in the restaurant.

Q. Did he have any interest in the operation of the two clubs? A. I do not think so.

Q. He was simply an employee?

A. Yes, sir; just an employee.

Q. Did you, during 1944, know one Andrew Desamoni?

A. I refuse to answer the question.

The Court: Same order. The Court will direct you to answer.

A. He was also employed in the gaming room.

Q. Did he have any interest in the enterprise?

A. Not that I know.

Q. Did you, during 1944, know one Demetris Sartanos? A. I refuse to answer.

The Court: Same order. The Court directs you to answer.

A. He also worked in the gaming room. Just a paid employee.

Q. Was my pronunciation of that name correct?

A. I wouldn't know how to pronounce it myself.

Q. Do you know to what individual that refers though? A. Yes, sir.

Q. Did he have any interest in the enterprise?

A. Just a paid employee.

(Testimony of David N. Kessel.)

Q. During the year 1944 did you know one Michael Necheck? [607]

A. I refuse to answer.

The Court: Same order.

A. He was also a paid employee.

Q. In what part of the establishment was he employed? A. The gaming room.

Q. Was he also a paid employee?

A. A paid employee.

Q. Did he have any interest in the enterprises, to your knowledge? A. None that I know of.

Q. There has been testimony here, Mr. Kessel, that the books and records of the 21 Club, of the San Diego Social Club, as well as those of the 311 Club, all in El Cerrito, were delivered in about April, 1951, to the defendant, Elmer Remmer, and that a receipt was given therefor.

Mr. Gillen: Objected to as leading and suggestive.

Mr. Campbell: It is preliminary to the question.

The Court: Objection overruled.

Q. Do you have such receipt? A. No, sir.

Q. Do you know who does have that receipt?

A. I refuse to answer the question.

The Court: The Court will direct you to answer the question.

A. Mr. Pechart has the receipt. [608]

Q. Were you, during the years 1944 to 1946, inclusive, familiar with the operation or business known as the 311 Club, located at 311 Panhandle Boulevard?

(Testimony of David N. Kessel.)

A. I refuse to answer the question.

The Court: The Court orders you to answer the question, Mr. Kessel.

A. Yes, I was.

Q. Did Mr. Remmer, the defendant here, have an interest in that business or profits thereof?

A. No, sir. Would you repeat that question?

(Question read.)

Q. Shall I divide the question?

A. I wish you would.

Q. Did Mr. Remmer have an interest in the business?

A. I decline to answer the question.

The Court: The Court does order and direct you to answer the question, Mr. Kessel.

A. Mr. Remmer was no partner in that business.

Q. Mr. Kessel, I will ask you if you had an arrangement with Mr. Remmer, whereby he received a part of the profits of that business during the years 1944 and 1945?

Mr. Gillen: We are going to offer the objection, may it please the Court, this gentleman is Mr. Campbell's witness. The questions are very leading and suggestive. The direct examination should be conducted the same as any other direct [609] examination, I know your Honor will agree. He is cross-examining his own witness.

The Court: The Court will overrule the objection.

(Question read.)

(Testimony of David N. Kessel.)

Mr. Gillen: We offer the further objection it has been asked and answered by the witness.

The Court: Objection overruled.

A. I refuse to answer.

The Court: The Court orders you to answer the question. You know, counsel—I am speaking to the witness' counsel now—it seems to me unusual and frivolous, if this witness is going to stand on his constitutional rights, he should do so, rather than force the Court to use time filling this record full of orders.

Mr. Wiseman: That was the suggestion I had this morning, that some arrangement could be made for stipulation that could be entered. The thing I suggested this morning; that it would be deemed—

The Court: No, he will have to claim his privilege whenever he intends to claim it, but claiming it is one thing and abandoning it is another. That is the thing that annoys me. We are just wasting so much time cluttering the record. Now it would seem to me that if the witness, in good faith, is claiming a [610] privilege under the Constitution, he ought to stand on it and not abide with the order of the Court. In other words, if he is going to answer a question by the order of the Court, it is a frivolous thing to keep going the way we are now.

Mr. Wiseman: I think he is compelled to under the law to stand upon his rights.

The Court: I can't understand, if he is claiming his privilege and then answers the question when

(Testimony of David N. Kessel.)

directed what is his position? Hasn't he waived the privilege as to that question?

Mr. Wiseman: I don't think he has waived his privilege. He is sustaining his privilege and also obeying the order of the Court. He would be caught between two fires.

The Court: I was hoping we might find some way of simplifying it.

Mr. Wiseman: I am willing to go along. That is what I suggested this morning, but he is answering questions under order of the Court.

The Court: The thought I had, if his claim was made in good faith, it would seem to me he would stand on.

Mr. Wiseman: If he did that, he would be in contempt of the order of the Court, which the witness apparently doesn't intend to do.

The Court: Very well. [611]

Mr. Wiseman: Unless it is understood in the interest of time—

The Court: No, I think he ought to be entitled to make his claim as he goes along.

(Last question read.)

A. I refuse to answer that.

The Court: The Court will order you to answer the question.

A. We did not have any agreement. It is customary in the 21 Club and 311 Club and we gave Mr. Remmer a bonus, just a friendship bonus. One was across the street from the other and we just

(Testimony of David N. Kessel.)

gave a bonus and whatever the bonus is, it is on the books. I don't know the amount. It is customary in our business to give a bonus. The place he had over there and the other place run in conjunction and we give him a little bonus. I don't know the amount. The amount is on the books, and as I said before, that is all I know about the business. I wasn't very active in it; in fact, I wouldn't be there maybe once a week or once every two weeks.

Q. How was that amount arrived at?

A. Well, I don't know. My business is all percentage, something on the net. I only noted the amount. I don't remember the percentage. As I said, I wasn't very active there and I didn't pay much attention because I had my own business to take care of. [612]

Q. It was then based upon percentage?

A. No, just a friendship bonus. I don't know whether 2 per cent or 5 per cent or 10 per cent.

Q. I am going to show you government's Exhibit 74, being partnership return income for 1944 of W. M. Pechart, D. N. Kessler and Fred Grunewald, doing business as the 311 Club, and ask you if you recognize that return? A. Yes, I do.

Q. Is that the return of the 311 Club for the year 1944?

A. Well, I never knew the amounts that were added. The accountant took care of any account.

Q. You do recognize the document, though?

Mr. Gillen: Is that some copy?

Mr. Campbell: This is the original.

(Testimony of David N. Kessel.)

Mr. Gillen: It speaks for itself.

A. I recognize the signatures.

Q. I call your attention to Schedule I, "Partner's share of the income"; it sets forth the following: E. L. Price, \$1241.66; Fred Grunewald, \$2793.72; E. Remmer, \$1257.18; W. M. Pechart, \$3562.03; D. N. Kessler, \$3562.03. Directing your attention specifically to E. Remmer, \$1257.18, I will ask you if that refreshes your recollection in any manner as to how the amount paid to Mr. Remmer was arrived at?

A. As I said before, I never paid no attention to this Club. I came out there maybe once a week or once every two weeks, [613] maybe once a month, and I know there was a little money—I thought it might have been five or six hundred at one time, but I don't recollect—it might be \$1257 just as well as five hundred.

Q. Do you recall who managed the club at that time, referring to the 311 Club?

A. I don't remember the man's name.

Q. I call your attention to the fact that the third person mentioned here, in addition to yourself and Mr. Pechart, is one Fred Grunewald. Who was Fred Grunewald?

A. Mr. Grunewald owned the building.

Q. Did he have anything to do with the management of the concern?

A. He had nothing to do with the management.

Q. I call your attention to, under the Schedule I, "Partner's Share of Income," there is the name of

(Testimony of David N. Kessel.)

one L. E. Price. Who was L. E. Price?

A. I believe he worked there.

Q. Did he have an interest in the enterprise?

A. I do not think so.

Q. Was he an employee?

A. Employee, paid employee.

Q. He is listed here as a partner. Does that refresh your recollection as to his connection with the 311 Club?

A. He might have been listed as a partner, but I think the [614] accountant listed him as a partner and then later on they changed it. There were only three people in the partnership.

Q. Only three people?

A. Mr. Grunewald, myself and Mr. Pechart.

Q. Was that true for both the years 1944 and 1945? A. That is correct, yes.

Q. Aside from these businesses to which I have called your attention, do you know of any other businesses in which Mr. Remmer had an interest, either as a partner or receiving a share of the profits, during the years 1944 to 1946, inclusive?

A. None with my partner.

Q. You say "my partner"; to whom do you refer? A. Mr. Pechart.

Q. These three then were the only ones which you and your partner had any contact with Mr. Remmer?

A. That is right, the only ones I know.

Q. Do you know of any other businesses in or

(Testimony of David N. Kessel.)

about El Cerrito in which Mr. Remmer had an interest? A. No.

Mr. Gillen: Objected to as leading and suggestive.

Mr. Campbell: He said, no.

The Court: Objection overruled. The answer may stand.

Mr. Golden: I will withdraw the objection if he has answered.

Q. In whose name were the licenses at the [615] 311 Club?

A. They belonged to Mr. Grunewald. Mr. Grunewald, he owned the building.

Q. They were in his name?

A. He had nothing to do with that. That was his part. It was on the same premises but had nothing to do with it. That was his own saloon and that was his own profit, whatever he made, that was his own.

Q. Did Mr. Remmer contribute any capital or investment in the 311 Club?

Mr. Gillen: Objected to as asked and answered. He said Mr. Remmer had no interest in it; he was given a friendship bonus.

The Court: Objection will be overruled. Read the question.

(Question read.)

A. None monies whatsoever; nothing.

Q. Now coming back to the 21 Club and San Diego Social Club, which you have testified that Mr. Remmer had a 50 per cent interest in during

(Testimony of David N. Kessel.)

the years 1944 to 1946, inclusive, were any formal papers of agreement or partnership drawn up?

A. No, sir; there was no agreement of partnership.

Q. You had no agreement?

A. No agreement.

Q. By that you mean there was no written agreement?

Mr. Gillen: Objected to as leading and [616] suggestive. This is his witness that he is cross-examining.

The Court: I understand counsel withdraws that question.

Mr. Campbell: Yes, I withdraw that question.

Q. What was the nature of agreement or understanding that you had with Mr. Remmer as to the division of profits?

A. Mr. Remmer had 50 per cent and I had 25 and my partner, Mr. Pechart, had 25 per cent. We had no agreement. That is the way we do business.

Q. When you use the word "agreement," what do you mean by that?

A. We had no agreement. We just simply—I had 25, Mr. Pechart had 25, and Mr. Remmer had 50.

Q. By the word "agreement," are you referring to a written agreement? A. Yes, sir.

Mr. Gillen: Objected to as leading and suggestive, cross-examining his own witness.

The Court: Objection overruled. You may answer the question.

(Testimony of David N. Kessel.)

A. We had no written agreement.

Q. As I understand you, you did have this understanding as to the division of profits; is that correct? A. Yes, sir.

Q. Now when was that first entered into?

A. I can't remember that. It might have been the first day that we opened the doors. [617]

Q. Well, when was that?

A. '43 or '44. I took no active part in this.

Q. What is your best recollection as to when the 21 and San Diego Social Clubs were opened?

A. I think they were opened about '43 or '44, between '43 and '44; I wouldn't know for sure.

Q. I am going to show you plaintiff's Exhibit 56, the individual income tax return of Joseph E. Billington for the year 1943, prepared by G. E. Simmons and associates and reporting the profit and loss from the business known as the San Diego Social Club, and ask you if that refreshes your recollection as to when that business was opened?

A. I never saw this return; in fact, I saw very few returns. These were made out by the auditor.

Q. Does the fact that Joseph E. Billington reported the operation of the San Diego Social Club in 1943 of itself refresh your recollection?

A. If it is on our books, that is the amount and that is all I know about it. If the accountant has it on the books and it is recorded, that is the amount. I wouldn't know the amount.

Q. And where are the books of the San Diego Social Club and the 21 Club at this time?

(Testimony of David N. Kessel.)

A. I refuse to answer.

The Court: The Court will direct the witness to answer the question. [618]

A. The books were turned over to Mr. Remmer. Mr. Remmer wanted the books.

Q. Do you recall when they were turned over to him? A. Sometime in April.

Q. And at that time were there also turned over to him the books of the 311 Club?

A. All the books were turned over. He wanted them for his personal tax. He had some tax trouble and he wanted the books. I was in there when he got the books.

Q. Will you state whether or not he has had those books since that time?

Mr. Gillen: That is certainly calling for his opinion and conclusion.

Mr. Campbell: If he knows.

Mr. Gillen: That is cross-examination of his own witness and calling for speculation.

Mr. Campbell: I am examining under difficulties.

Mr. Gillen: I assign that as misconduct.

The Court: Objection is overruled. Answer the question.

Mr. Gillen: May I make an assignment of misconduct?

The Court: I think by making the assignment you would give prominence to something that no one else heard. I do not believe anybody heard it. The objection is overruled. Read the question.

(Testimony of David N. Kessel.)

(Question read: "Will you state whether or not he has had [619] those books since that time, if you know?")

A. I refuse to answer.

The Court: The Court directs you to answer the question.

A. Mr. Pechart has a receipt for the books and I believe Mr. Remmer has the books.

The Court: That answer is not responsive. It may go out. Listen to the question.

(Question read.)

A. As far as I know, Mr. Remmer has the books and we have the receipt.

Mr. Gillen: I move the answer be stricken as not responsive—"as far as I know."

Mr. Campbell: I think it is responsive.

Mr. Gillen: I don't think it is, and at this time I desire to make assignment of misconduct against counsel for asking these questions because I charge the questions are being asked in bad faith, which will develop before your Honor.

The Court: The record may show the assignment.

Mr. Gillen: We will develop later what we charge bad faith.

The Court: I want to make an observation, not in regard to this particular subject, but any like subject you think it is necessary to make an assignment. The record will show the reasons for it.

(Testimony of David N. Kessel.)

Mr. Gillen: It is sometimes hard for jurors to follow [620] remarks of counsel.

The Court: But assignment is not for the benefit of the jury. It is for the appellate court.

Mr. Gillen: The assignment is for the appellate court and the assignment is directed to your Honor and the assignment is for the benefit of the jury, to the extent that your Honor may act upon assignment concerning a matter that the jury has heard.

The Court: I have a little different view of it. I don't see it.

(Last question and answer read.)

Mr. Campbell: You may cross-examine.

Cross-Examination

By **Mr. Gillen:**

Q. Mr. Kessel, is it not a fact that before the 21 Club and before the San Diego Social Club came into existence that you and your partner, Mr. Pechart, employed an accountant by the name of Bishop? **A.** Yes, sir.

Q. And Mr. Bishop kept books for you and your partner in connection with your business enterprises? **A.** Yes, sir.

Q. And that was exclusive of the 21 Club or the San Diego Club; is that correct?

A. That's right.

Q. I am talking about before those clubs came into existence. [621] Now when the San Diego Club and the 21 Club came into existence, it is a fact,

(Testimony of David N. Kessel.)

is it not, that Mr. Bishop continued serving you and Mr. Pechart and included in his work for you the keeping of the books of the 21 Club and the San Diego Club? A. That is correct.

Q. It is a fact, is it not, that Mr. Bishop became a very sick man and subsequently died?

A. That is correct.

Q. It is a fact, is it not, Mr. Bishop became too ill to continue his work for you, that you then employed the services of an accounting firm as G. E. Simmons and Associates?

A. That is right.

Q. And G. E. Simmons and his associates kept books for you and your partner, Mr. Pechart, for the several and various enterprises in which you were interested; is that correct?

A. That is right.

Q. And included in those enterprises was the 21 Club and also the San Diego Social Club, which had then come into existence; is that true?

A. That is right.

Q. And Mr. Bishop had also kept the books for the 311 Club, is that so, or had the 311 Club come into existence after Mr. Bishop became too ill to work for you?

A. I don't think he ever kept the books for the 311 Club. [622]. I think he had died.

Q. You and Mr. Pechart paid Mr. Bishop for keeping books for your various enterprises out of your own funds; is that true?

A. That is right.

(Testimony of David N. Kessel.)

Q. And you have stated that you were inactive, insofar as the 21 Club and the San Diego Social Club was concerned, that you only went there infrequently; is that correct?

A. That is correct.

Q. And took no participation in the active operation of either the gaming room or the restaurant or the bar? A. That's right.

Q. Now I understood you to testify that in regard to the 311 Club, that this Mr. Grunewald owned the building and had a tavern business operating there; is that correct?

A. That is right.

Q. And that he derived his interest from the 311 Club by permitting you and your partner to operate in conjunction with this tavern?

A. That's right.

Q. And he conducted his tavern business and you conducted the other business yourselves, you and your partner; is that correct? A. Yes.

Q. And he derived his share in the profits from the use of his building and the location and so on; is that correct? A. Yes. [623]

Q. Now with regard to the 21 Club and the San Diego Social Club, it is true, is it not, that not Mr. Remmer but Mr. Grunewald owned the building; is that correct? A. That is right.

Q. And you and your partner conducted the gaming portion, or so-called San Diego Social Club; is that correct? A. That is right.

(Testimony of David N. Kessel.)

Q. And insofar as the restaurant and tavern was concerned, who conducted that?

A. That was taken care of by Billington and Riggardio. They handled the restaurant and tavern.

Q. To your knowledge did Mr. Remmer work at the 311 Club in any capacity at any time?

A. Never.

Q. To your knowledge did Mr. Remmer work at the 21 Club in any capacity at any time?

A. Never worked there.

Q. To your knowledge did Mr. Remmer work at the San Diego Social Club in any capacity at any time? A. Never.

Q. To your knowledge did Mr. Remmer spend any time in any of those three clubs? Do you understand my question?

A. Yes, I do. Never spent any time in the 311 Club, but he used to visit the 21 Club. Had dinner in there.

Q. He used to go in there for dinner at the 21 Club? [624] A. Yes.

Q. Now you stated in your direct examination that the books that were kept by your accountants, namely, the accounts of the 311 Club, the accounts of the 21 Club, and the accounts of the San Diego Social Club, had been turned over to Mr. Remmer by your partner, Mr. Pechart, and that a receipt had been taken? A. That's right.

Q. And I believe that Mr. Campbell in his question fixed the time as April of 1951?

(Testimony of David N. Kessel.)

Mr. Campbell: Objected to as assuming a fact not in evidence. The witness fixed the time.

Mr. Gillen: Mr. Campbell asked so many leading questions—

Mr. Campbell: I ask that be stricken.

The Court: I think so.

Q. Well, regardless of who fixed the time, do you now recollect that time or can you state the time was about April of 1951?

A. Sometime in April. It might have been April 21st, I don't know the exact date.

Q. I am talking about the year.

A. I wouldn't know the year.

Q. You wouldn't know the year? Mr. Kessel, was it within your knowledge, or is it within your knowledge that Internal Revenue Agents Farley and Gould took over all of the books and records and the accounts of the 21 Club and the San Diego Social Club [625] for the years 1943, 1944 and 1945 and worked on them for approximately four months and returned them with an audited report, reporting on the year 1943 on November 21, 1947—that is, completing the report and turning back the books on that year—and reporting on the year 1944, completing their survey and reporting on the year 1944 on April 5, 1948, and completing and reporting on the year 1945 on July 27, 1948, and returned those books and accounts for those two clubs to you and Mr. Pechart and your accounts on the dates given?

A. The books were audited at that time by these

(Testimony of David N. Kessel.)

two agents. They were about four or five months and they returned them to us.

Q. They turned the books over to you?

A. Yes, sir.

Q. And is it true that those books were in the possession of you and your partner and your accountants from not later than July of 1948 until they were turned over to Mr. Remmer in the month of April of 1951?

A. Well, I never saw the books there because I never kept track of all the books that were there.

Q. In regard to the 311 Club, is it within your knowledge that the same two agents had those books, which were turned over voluntarily to them by you and your partner, and worked on those books for a matter of four or five months and returned them to you as being through with them on July 27, 1948, and that they [626] were in your possession from that time until April of 1951, when they were turned over to Mr. Remmer?

A. I wouldn't know the exact date, but they audited all the books of all the enterprises.

Q. Is it within your knowledge that the Internal Revenue agents, when they turned the books back, stated that they had completed their audits and were through with those books?

Mr. Campbell: "Within your knowledge"—no proper foundation laid.

The Court: You may answer the question.

A. I believe they were through with the books.

Q. Well, believe—did the agents tell you they were through?

(Testimony of David N. Kessel.)

A. Well, I never spoke very much to the agents.

Q. You don't know? A. I don't know.

Q. Now do you know why Mr. Remmer wanted to take over the books in 1951, April?

Mr. Campbell: Objected, calling for his conclusion.

Mr. Gillen: I am calling for his knowledge, if he knows. If he doesn't, he can say so.

The Court: He may answer the question.

Mr. Campbell: I submit, if the Court please, it should be in the form of conversation. He can't interpret Mr. Remmer's mind except as told to him by Mr. Remmer.

The Court: Well, I will sustain the objection in that form. [627]

Q. Mr. Kessel, did Mr. Remmer ever have any conversation with you in which he stated to you why he wanted to take over the books of those three clubs? A. He never asked me for them.

The Court: We are getting along fine, so I don't want any exchanges between counsel. I don't want any remarks made back and forth between counsel at all.

Mr. Gillen: I think that is all.

Mr. Campbell: That is all.

(Witness excused.)

(Jury and alternate jurors admonished and short recess taken at 3:05 p.m.)

3:20 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

WALTER M. PECHART

a witness on behalf of the plaintiff, being previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Mr. Pechart, I will put to you again the question which was asked you yesterday. With regard to a portion of the premises which you rented from Mr. Remmer, known as the San Diego Social Club, did you operate any business on those premises?

A. I refuse to answer on the ground it may tend to incriminate me. [628]

Mr. Campbell: I press the question.

The Court: The Court will now, and does, order and direct you to answer the question.

A. Yes, I was putting in a booking office.

Q. What do you mean by booking office?

A. Race horses.

Q. And in what year was that?

A. That I can't say. It was after the 21 Club had closed. It is a matter of record on my returns.

Q. During the years 1943 and 1944 particularly, and up to and including 1946, were you associated with the defendant, Elmer Remmer, in the opera-

(Testimony of Walter M. Pechart.)
tion of any business or businesses on those premises? A. May I have the question?

(Question read.)

A. I refuse to answer on the ground it may incriminate me.

The Court: The Court now orders and directs you to answer the question, Mr. Pechart.

A. Yes, I was.

Q. What was the nature of the business or businesses with which you were associated with Mr. Remmer? A. Gambling, cafe and food.

Q. What name or names did those businesses operate under?

A. The food and cocktail, lunch, operated under the name of 21 Club; the gaming room operated under the name of the [629] San Diego Social Club.

Q. Who, if any one, supervised the operations, so far as the bar and food were concerned?

A. Mr. Denny and Mr. Riggeotti.

Q. By Mr. Denny are you referring to Joseph Billington, sometimes known as Frankie Denney?

A. Yes, I am.

Q. Was it by the name of Denny that you knew him? A. Yes, I did.

Q. In whose name were the liquor licenses?

A. At what time?

Q. In the years 1943 to 1946, inclusive.

A. I couldn't say. They were in two names at that time when first taken over.

Q. Is the name Frank Cavani familiar to you?

(Testimony of Walter M. Pechart.)

A. Yes.

Q. Is that one of the names on the license?

A. Yes.

Q. Is the name Joe Billington familiar to you?

A. Yes.

Q. Is that one of the names on the license?

A. That is right.

Q. At that time did you know anyone by the name of Joe Billington?

A. I knew Billington, but I am not sure on the first name. [630] That is Frank Denny, the same man, but I am not sure of the first name.

Q. At that time were you aware that Billington and Denny were one and the same man?

A. Yes, I was.

Q. Do you recall approximately when the change was made in the licensee's name from Cavani to Billington? A. No, I have no idea.

Q. Do you recall who directed that change to be made?

A. I know I didn't. That I couldn't say.

Q. You know you didn't? A. That's right.

Q. Who was in charge of the gambling part of the business, or what was known as the San Diego Social Club?

A. Well, there was a gentleman by the name of Walter Parman, a gentleman by the name of Michael Necheck, a gentleman by the name of Andrew Desamoni.

Q. Was there also a Tony Riggoetti?

(Testimony of Walter M. Pechart.)

A. Well, he was more or less the overseer of food and the bar.

Q. How about Dimetios Saratan?

A. He was what we call the floor boss.

Q. Is that the correct way to pronounce his name? A. Jimmy Sarantos.

Q. Who were the interested parties, so far as division of the profits of the operation of those two clubs? [631]

A. Well, it was Pechart, Kessel and Remmer.

Q. What was Mr. Remmer's interest?

A. Mr. Remmer's interest was 50 per cent, Pechart and Kessel 25 per cent apiece, but we gave bonuses at the end of the month.

Q. Did any of the parties to whom you gave bonuses have any interest in the business itself?

A. Now when you say interest, do you mean any investment?

Q. Yes. A. They did not.

Q. Were the bonuses which you gave based upon the profits for the month? A. That's right.

Q. And were they given to whatever employees were employed during that month?

A. Well, they were given to the key men.

Q. In that regard, did you continue to give bonuses to those men after they left your employment? A. After they left the employment?

Q. Yes. A. Absolutely not.

Q. So that the bonuses, as I understand it, were given to them for the purpose of employment.

A. They stopped when the employment stopped.

(Testimony of Walter M. Pechart.)

Q. By whom were the bonuses paid?

A. By whom were the bonuses paid? [632]

Q. Yes.

A. By the cashier and the floor man, the manager, Mr. Riggeotti, the overseer.

Q. Do you know how that was handled on the books of the business?

A. It is all on the books, but how it was handled I can't state. It is six or seven years ago and the accountant made all those sheets up.

Q. Who kept those records?

A. To start with, a man by the name of Bert Bishop; he was our accountant, and he passed away and then Mr. G. E. Simmons came in.

Q. When was that business opened, incidentally?

A. What business?

Q. The 21 Club and San Diego Social Club?

A. In '43.

Q. And when was it that Mr. Simmons took over after Mr. Bishop's decease?

A. That I couldn't say.

Q. Do you presently have the records of that business, as well as the records of the 311 business, for the period 1943 to 1946, inclusive, in your possession?

Mr. Gillen: To which we offer objection, may it please the Court. It has been established in the record that the books were out of this witness' possession, out of the [633] bookkeeper's possession, out of the partners' possession and repeated asking of that question is for the purpose of emphasis.

(Testimony of Walter M. Pechart.)

The Court: Objection overruled. Answer the question.

(Question read.)

A. No, I have not.

Q. Do you have in your possession a receipt from anyone, indicating to whom you delivered the books? A. Yes, I have.

Q. Will you produce that receipt?

A. To whom?

Q. Will you produce it to the Court at this time? (Witness produces document.) May I see the document?

The Court: Yes.

Mr. Campbell: May this be marked for identification, if the Court please, Plaintiff's 96?

The Court: So marked.

Mr. Gillen: As to prosecution's Exhibit 96 for identification, the defense is prepared to stipulate it may be offered in evidence if the prosecution cares to.

Mr. Campbell: We offer it.

The Court: It may be admitted in evidence.

Mr. Campbell: At this time I would like to read this document to the jury. Plaintiff's Exhibit 96, April 24, 1951.

(Reads Exhibit 96.)

Q. Mr. Pechart, do you know the amount of investment of [634] Mr. Remmer in the 21 Club?

A. No, I do not.

(Testimony of Walter M. Pechart.)

Q. Do you know the amount of his investment in the San Diego Social Club?

Mr. Gillen: Just a moment. I am going to offer the objection it is leading and suggestive and assuming something not in evidence. There is no reference here that there was any investment at all.

The Court: I think the objection is good on the grounds it is assuming something not in evidence.

Mr. Campbell: Possibly the latter; I can't see how it is leading and suggestive.

The Court: No, I am more interested in the latter.

Mr. Campbell: I will reframe the question. The question and answer may be stricken.

Mr. Gillen: And so far as the previous question and answer—

The Court: Yes, the previous question and answer will be stricken.

Q. Mr. Pechart, do you know the amount of Mr. Remmer's investment, if any, in the 21 Club?

A. No, I do not.

Q. Do you know the amount of Mr. Remmer's investment, if any, in the San Diego Social Club?

A. No, I do not. [635]

Q. During the years 1943 to 1946, inclusive, did you, yourself, spend any time on these premises during operating hours? A. Yes, I did.

Q. Did you, yourself, take any active part in the management? A. No, I did not.

Q. In connection at the time the business was opened of the San Diego Social Club, or the gam-

(Testimony of Walter M. Pechart.)

bling part of the business, was a bank roll set up?

A. Yes, it was.

Q. And what was the amount of that bank roll?

A. I couldn't say at the present time. It is entered in the books, the amount.

Q. What is your best recollection?

A. I haven't the slightest idea.

Q. Did Mr. Remmer contribute to that bank roll?

A. Whatever is in the books is correct.

Q. You have no recollection of what is in the books? A. No, I haven't.

Q. When was the last time that you examined the books?

A. I don't believe I have ever examined them. I have an auditor, a certified public account, and I left it entirely up to him.

Q. You stated that you had never examined the books, but that whatever was in the books was correct. Will you explain that answer? [636]

A. Well, whatever was turned over to my auditors I would say was correct, yes.

Q. You believe it was correctly entered?

A. Yes, I do.

Q. Did they make reports to you from time to time as to such matters?

A. Monthly reports, yes.

Q. And were monthly reports made with respect to the San Diego Social Club?

A. No, I had several enterprises and it was made as a whole.

(Testimony of Walter M. Pechart.)

Q. On those enterprises was there also included on this monthly report sheets the operations of the 21 Club and San Diego Social Club? A. Yes.

Q. Were those among the records turned over to Mr. Remmer?

A. No, just for my own personal use.

Q. You still have those records, do you?

A. No, I have not.

Q. Where are those records now?

A. Well, they were of no value to me.

Q. I didn't ask you whether or not they were of value, I asked you where they are.

Mr. Gillen: Just a minute, I object, he is arguing and cross-examining his own witness. This is direct examination and it smacks all the way through of cross-examination of his [637] own witness.

The Court: Objection overruled. Answer the question.

(Question read.)

The Court: Can you reframe the question?

Q. Where are those monthly reports sheets of the 21 Club and the San Diego Social Club at the present time?

A. It wasn't a report sheet. It was an adding machine tape to let me know how we were going along, whether we were going in the red or using black ink.

Q. How was that adding machine record taken? Was each business shown separately? A. No.

(Testimony of Walter M. Pechart.)

Q. Then do I understand there was only one figure on the tape? A. That's all.

Q. Do you at the present time have in your possession—I do not mean physically on the stand, but in your business possession—any records relating to the assets, liabilities, receipts or disbursements of the 21 Club or the San Diego Social Club for the years 1943 to 1946 inclusive?

A. No, I haven't.

Q. Calling your attention to plaintiff's Exhibit 96, receipt of Mr. Remmer for various matters set forth in it, I will ask you if included on there were all records of any kind pertaining to the operation of the 21 Club, San Diego Social Club for the years 1943 to 1946 inclusive, which were in your [638] possession at the date of that receipt?

A. As far as I know, yes.

Q. Were you present at the time those records were turned over to Mr. Remmer?

A. I am not sure whether I was or not. Mr. Remmer talked to me about the records and asked me if the government had them or if I had them and asked me if they had been audited and I told him yes—

Mr. Campbell (Interrupting): That is not responsive to my question.

(Question and answer read.)

The Court: The answer may stand.

Mr. Gillen: I do not think the witness has completed his answer.

(Testimony of Walter M. Pechart.)

The Court: I think he has fully answered the question.

Mr. Campbell: I think the first part of the answer fully answers the question.

The Court: Yes, I think it does. The question is fully answered now.

Q. During the years 1944 and 1945 were you familiar with the business known as 311 Club, situated at 311 Panhandle Avenue in El Cerrito?

A. Yes, I was.

Q. Did Mr. Remmer have an interest in that club? A. No, sir. [639]

Q. Did you have, during those years, some arrangement or arrangements whereby Mr. Remmer was to receive a portion of the profits of that club?

A. No, I gave him a small portion because he didn't approve of the club being in there. As a matter of courtesy I gave what we call it a little bonus. As far as any investment, he didn't have one dollar invested.

Q. On what was that bonus based, that is to say, was it a percentage?

A. I am not sure whether it was a 5 or 10 per cent cut off 75 per cent at the time. I am not sure. The records will show.

Q. Those are on the records referred to on the receipt before you, are they not? A. Yes.

Q. And you say it was a percentage taken from 75%? A. I am not sure, but I think it was.

Q. That is your best recollection?

A. Yes, it is.

(Testimony of Walter M. Pechart.)

Q. Now what was the location of the 311 Club with relation to that of the San Diego Social Club?

A. Across the street.

Q. And when was the 311 Club opened?

A. After the 21 Club.

Q. Do you recall what year?

A. No, I do not. It is in the books, in the records. [640]

Q. I believe you previously stated that the San Diego Social Club was opened in 1943?

A. San Diego Social Club and 21 Club were opened. You asked me about the 311 Club?

Q. Yes.

A. The 311 Club was across the street and opened after the 21 Club and the San Diego Social Club.

Q. Do you know how long after, to the best of your recollection?

A. It might have been eight months or a year, I couldn't say. I am not positive.

Q. Now with relation to the 311 Club and the percentage which you say you gave to Mr. Remmer, that arrangement was made at the time the 311 Club, I take it, was opened, is that correct?

A. No, we hadn't opened the 311 Club.

Q. I mean your arrangement with Mr. Remmer, when was that entered into?

A. Started the moment it was open.

Q. How long did it continue?

A. Until we closed.

Q. And when did you close the 311 Club?

(Testimony of Walter M. Pechart.)

A. Well, I couldn't state.

Q. Did that arrangement continue throughout 1944 and 1945?

A. If we were open, it did.

Q. I am going to show you government's Exhibit 74, 1944 partnership [641] return of income of Pechart and Kessel and Grunewald, and ask you if you are familiar with the signature appearing as the party mentioned in that return?

A. Yes, I am.

Q. That is your signature?

A. Yes, that is my signature.

Q. Now does that refresh your recollection as to whether or not you were open during the year 1944?

A. What is the date? It must have been. This is March 15, 1945, so it must have been 1944.

Q. And that is return for 1944, is it not?

A. That is correct.

Q. I show you plaintiff's Exhibit 75, 1945 return of Pechart, Kessel and Grunewald for that year, and I call your attention to the signature of the party purportedly making the same and ask you if you are familiar with that signature?

A. That is mine.

Q. Is that your signature? A. Yes, it is.

Q. Now does that refresh your recollection as to whether or not you were open and operating during that year?

A. This is dated March 4, 1946. Does that mean this is filed of '46 or '45?

(Testimony of Walter M. Pechart.)

Q. I ask you to examine the document. You will observe it is return of income for 1945. [642]

A. That's right.

Q. Does that refresh your recollection?

A. Yes, it does.

Q. That you were or were not open in 1945?

A. We were.

Q. I show you plaintiff's Exhibit 76, return for 1946 of Pechart, Kessel and Grunewald, calling your attention to the language, "Not in Operation" and to the signature appearing as the party making the same. Are you familiar with that signature?

A. Yes, I am.

Q. Whose signature is that?

A. David N. Kessel.

Q. And referring to the document itself and the words, "Not in operation," does that refresh your recollection as to whether or not the 311 Club was operating during 1946? A. Yes it was.

Q. It was in operation or was not?

A. It was.

Q. And over what part of 1946 was it operated?

A. That I couldn't say.

Q. So that when this return, plaintiff's Exhibit 76, recites "Not in Operation," that it was isn't the fact?

A. It would not be in operation if the return says it was not in operation. [643]

Q. Now let's straighten this out. Were you, or were you not, during the calendar year 1946, operating the 311 Club?

(Testimony of Walter M. Pechart.)

A. I would say no. It am not positive.

Q. Now directing your attention again to government's Exhibit 74, the 1944 return, and particularly to Schedule I, being 1944 return of the 311 Club, under "Partner's Share," I will direct your attention to the fact that some \$12,416.61 of profit is reported on this return and that under Schedule I, "Partnership Shares of Account" is listed: E. Remmer, \$1,257.18, slightly more than 10 per cent of the entire net income. I will ask whether or not that refreshes your recollection as to the profit-sharing arrangement which you had with Mr. Remmer?

A. This was prepared by my auditors and my accountants, has my signature on it, so it must be right.

Q. Does that refresh your recollection as to the profit-sharing arrangement which you had with Mr. Remmer for that year? A. No, it does not.

Mr. Gillen: Just a moment—I am going to offer an objection.

The Court: He has already answered no. Does that make any difference?

Mr. Gillen: No, it does not. In the first place, I object to Mr. Campbell's characterization as partnership arrangement. It was described otherwise.

The Court: There is some question about [644] that.

Mr. Gillen: And No. 2, my second objection—

The Court (Interceding): I think your objection comes a little late on that score. You have

(Testimony of Walter M. Pechart.)

heard that question phrased that way two times.

Mr. Gillen: I move it be stricken.

The Court: It will stand. Motion denied.

Mr. Gillen: All right, then I make the objection the witness testified he had no recollection, but his accountant made it up and it must be right. I object to the speculation, conclusion on his part. If he has no recollection, he should say so. If he has a recollection, he should tell us.

The Court: The answer may stand. The motion is denied.

Q. Now, Mr. Pechart, I am going to show you plaintiff's Exhibit 75, the partnership return of income of 311 Club for the year 1945, and call your attention on the first part thereof to this language, under deductions: Salaries and wages \$55,844.76; plus bonus, \$20,785.34; total deduction for salaries and wages, \$76,630.10. I will ask you whether or not any part of the amount listed here of bonus, \$20,785.34, was paid to Elmer Remmer?

Mr. Gillen: Which exhibit is that?

Mr. Campbell: 75.

A. It is my signature and on the back of it Elmer Remmer, \$584.92. I didn't prepare it. I wouldn't swear whether it is true or not. [645]

Mr. Pechart: I made a mistake in my testimony. May I correct it?

The Court: Yes, you may.

Mr. Pechart: When you asked me if I visited Mr. Remmer's home I stated yes; you asked where

(Testimony of Walter M. Pechart.)

he lived. I said El Cerrito. I should have said Orinda, California.

The Court: We will take our recess at this time.

(Jury and alternate jurors admonished and excused.)

(In the absence of the jury.)

The Court: All right, Mr. Golden.

Mr. Golden: I only wanted to inquire if the Court would set a time for argument of the matter of deposit of those records last Friday. On Friday it was arranged or at least tentatively.

The Court: Argument will be had any time, should it happen, that you intend to introduce records.

Mr. Golden: The point is in the interim they are sealed up and we can't look at them.

The Court: I didn't order them sealed up.

Mr. Golden: In chambers Friday afternoon, after court had recessed—the reporter was not present, but some of the attorneys on each side were in there, and it was arranged over the week end that they would remain inaccessible to both sides. [646]

The Court: That was because we couldn't agree at that time. See if I have the right recollection of that. Agreement might be entered into between counsel whereby each side could have access to those records. That is what I would like to see done, if it is possible to do it.

Mr. Golden: If your Honor will recall, we expressed grave legal doubts as to the legal propriety

of the Court's action and it was tentatively arranged that your Honor would hear argument on the matter at one o'clock Monday, yesterday, and then something else came up. There is no record to show that we deposited those books and documents and we would like to be heard on it at a time convenient to the Court.

The Court: I am not going to open that question at the present time. The ruling will remain as the former ruling.

Mr. Golden: We would like, your Honor, to make a motion for the return of that material and other material and motion to suppress the introduction of that material and other material in evidence.

The Court: I think we can take care of the matters as the situation presents itself. I had in mind the idea we would probably encounter a serious legal problem and when we did, I proposed to hear from counsel. But I am not going to go behind the ruling [647] I made requiring the production of the records in the clerk's office.

Mr. Golden: I understand your Honor wouldn't vacate that order, but the motions we wish to make are for the return of that material and other material and motion to suppress the use—

The Court: Very well, but I am not going to postpone or delay this trial for hearing of those motions.

Mr. Golden: We do not care to postpone or delay the trial. We will make that at any time, we

will make it at nine o'clock tomorrow, at any time your Honor wishes.

The Court: No.

Mr. Pike: I am familiar with the circumstances of what took place last Friday with reference to orders and no order whatsoever was made by the Court at that time. However, the circumstances of the records having deposited with the clerk of the court by defense counsel were brought to the Court's attention and the concensus of the expressions there was neither the prosecution nor the defense would have access to those records, but there should be some further indication by the Court as to their being available to both parties, and if counsel's inquiry is directed to the proposition that they would like to have access to the records, I am in accord with that view. I feel that the records should be made accessible to both parties under conditions convenient to the clerk, so [648] work there and if necessary make arrangements to see them in the evening after usual court hours, which I feel could be arranged.

The Court: I believe that suggestion was made Friday and I believe the Court indicated that that could be approved. That is my recollection. I approve such an arrangement.

Mr. Golden: I ask permission to make a motion for the return of them and other material and for suppression of its use in evidence prior to the time it is opened up to the prosecution. I am willing to make the motion at any time.

The Court: Well, you can make your motion now.

Mr. Golden: All right, your Honor.

Now, if the Court please, the following records were deposited on Friday afternoon at approximately 1:30 in the afternoon, in compliance, under protest, with the Court's order, namely: (Starts to read list of records deposited.)

The Court (Interrupting): Do you have to read that long list into the record? Can't you give it to the reporter to copy?

Mr. Golden: I don't want to detain your Honor. Under Rule 41(e) of the Rules we are entitled to make a motion and produce evidence. It is going to take some time.

The Court: Well, we will be in recess until tomorrow morning at 10:00 o'clock.

(Recess taken at 4:12 p.m.) [649]

December 12, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

(Jury and alternate jurors admonished and excused until 11:00 o'clock.)

(Argument regarding documents filed with the clerk in absence of the jury.)

December 12, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury stipulated.)

MR. PECHART

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Pechart, when you were on the stand yesterday, I made inquiry as to certain individuals whom you described as employees in various capacities in the 21 Club and the San Diego Social Club, you recall that, do you? A. Yes, sir.

Q. Mr. Pechart, in connection with the operations of the 21 Club and the San Diego Social Club, who was it that hired or originally employed Joe Billington, or Frankie Denny, as you said you knew him? A. Well, I did not hire him.

Q. Well, who did, if you know? [650]

A. Well, that I couldn't say. When the place was opened, he was in there.

Q. But you had nothing to do with his work?

A. I had absolutely nothing to do with the hiring of Mr. Denny.

Q. With regard to Walter Parman, who hired him?

A. Mr. Parman was sent to us either from the Lake or San Francisco. I don't know who hired him.

Q. Either from where?

(Testimony of Walter M. Pechart.)

A. Mr. Parman was sent to us from the Lake, that is Lake Tahoe, or San Francisco. At that time Mr. Parman took charge I wasn't around El Cerrito.

Q. Did you have anything to do with his initial hiring? A. No, I did not.

Q. Do you know whether or not Mr. Parman had been employed at Cal-Neva at Lake Tahoe immediately to his employment at the San Diego Social Club?

A. Before he came to the San Diego Social Club?

Q. Yes.

A. No, Mr. Parman, I am pretty sure, came from the East, I am not positive.

Q. I thought you said from the Lake?

A. He was either on a vacation up to the Lake or he was on a vacation in San Francisco.

Q. In regard to A. Riggogardi, sometimes known as Tony Riggogardi, do you know who initially hired him? [651] A. No, I do not.

Q. Did you initially hire him?

A. No, I did not.

Q. Do you know where he had been employed prior to coming to the 21 Club and the San Diego Social Club?

A. He was with the State Board of Equalization.

Q. Of the State of California? A. Yes.

Q. With regard to Andrew Desimone, do you know who hired or employed him in connection

(Testimony of Walter M. Pechart.)

with the operation of the 21 Club and San Diego Social Club?

A. I think I had something to do with that.

Q. You hired him?

A. I didn't hire him, I suggested him.

Q. To whom did you suggest that he be employed? A. Mr. Remmer.

Q. And he was subsequently employed?

A. Yes.

Q. With regard to Demitris Sarantos—

A. That is Jimmy Arantos. I hired him.

Q. He was known to you as Jimmy Sarantos?

A. Yes.

Q. Incidentally, what were his duties there?

A. He was a floor boss.

Q. You hired him? [652] A. Yes, I did.

Q. In connection with hiring him, did you consult with Mr. Remmer? A. No.

Q. Now, as to Michael Mecheck, did you hire him?

A. I did not hire him. I couldn't say who hired him.

Q. You don't know who hired him?

A. No, he was the floor boss, the manager, he had the power of hiring.

Q. Do you know whether or not Mr. Kessel hired any of these individuals to whom I have referred?

A. I think he suggested Jimmy Sarantos to me.

Q. And you in turn hired him? A. Yes.

Q. Now you testified, I believe, Mr. Pechart, that

(Testimony of Walter M. Pechart.)
certain bonuses were paid to these employees by way of percentages, is that correct?

A. That is correct.

Q. Who fixed the amount of those percentages?

A. Well, the cashier, manager, and probably a couple of the bit bosses and myself, whoever happened to be on the floor.

Q. Were they fixed from day to day or month to month?

A. Oh, no; the end of the month.

Q. The end of each month?

A. That's right. [653]

Q. Were those percentages fixed and determined prior to the rendering of the services or after the services had been rendered?

A. After the services had been rendered.

Q. Did those bonuses apply to the 21 Club, that is to say, the bar and restaurant operation, as well as the San Diego Social Club, the gaming operation? A. That I couldn't say.

Q. You say you cannot say, do you mean you do not remember? A. I do not know.

Q. Will you state whether or not the same bonus percentage was used each month, or whether it varied from month to month, depending on—

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Mr. Campbell: I hadn't quite finished the question. I will reframe the question, Mr. Pechart.

(Testimony of Walter M. Pechart.)

Q. Was the same bonus percentage used each month, or did it vary from month to month?

A. I refuse to answer the question on the grounds it will tend to incriminate me.

Mr. Campbell: I press the question.

The Court: The witness is ordered and directed to answer the question.

A. As far as the key men, it was supposed to be the same and [654] if it varied, I don't remember. When I talk about key men, I am referring to the manager.

Q. Will you state who those key men were?

A. Well, there was Walter Parman, Andrew Desimone, Mike Necheck.

Q. Those were the key men. And what was the bonus percentage that was arrived at to pay to them?

Mr. Gillen: Objected to as asked and answered.

The Court: Objection overruled.

Mr. Gillen: He testified about percentage of 75 per cent of net profits yesterday.

Mr. Campbell: No, I think counsel is confused.

The Court: Objection overruled. Answer the question.

A. I am not positive. I think the manager was to receive five per cent off Pechart and Kessel, five per cent off Remmer.

Q. Let me see if I understand you correctly. From Pechart and Kessel combined share of 50 per cent, five per cent was to be paid?

A. That is correct.

(Testimony of Walter M. Pechart.)

Q. And from Mr. Remmer's 50 per cent, five per cent was to be paid?

A. That is correct. That was to the general manager.

Q. And you had during that period of time, I take it, one after the other of the three gentleman managers?

Q. We had three there probably at one time, but they weren't all in the capacity of general manager. [655]

Q. There would just be one general manager at a time? A. Just one general manager, yes.

Q. And he would receive five per cent from you and from Mr. Remmer, is that correct?

A. Yes.

Q. Now as to the other employees that were receiving bonuses, what percentage would they receive?

A. That I do not recall. I do not recall what Mr. Sarantos received and he was our key man, but he never was a general manager. I know we gave him a bonus, compensated him each and every month, but I do not recall what it was in the book.

Q. When you say "our key man," to what do you refer?

A. I mean he was the man that was suggested I hire him. You asked me who hired these other gentlemen and I told you I didn't know.

Q. Was your arrangement such that you had a man in there looking after your interests?

A. My arrangement was when the boxes were

(Testimony of Walter M. Pechart.)

taken off and the cash was balanced at the end of the night, Mr. Sarantos was in there.

Q. And he had been hired by you and Mr. Kessel? A. That is right.

Q. When you refer to the boxes being taken off, you refer to the metal boxes at the gambling table?

A. Not metal, they were wood. [656]

Q. In which bills are placed that pass over the gambling table and were passed by the dealer and it is customary to count those before the end of the evening?

A. It is customary to count them before at least three people.

Q. Did Mr. Remmer have a key man during that period of time?

Mr. Gillen: Objected to as calling for his conclusion.

Q. If you know, for the purpose of being present when the cash was counted?

Mr. Gillen: Objected to as calling for his opinion and conclusion.

The Court: Objection overruled.

A. Well, there was a cashier in there and there was a manager, Mr. Sarantos and Mr. Pechart and Mr. Desimone.

Mr. Campbell: No, I ask the question be read.

(Question read.)

A. Never heard of him having a key man. I had as much authority over the running of the game room as Mr. Remmer did. In fact, Mr. Remmer was very very seldom around there.

(Testimony of Walter M. Pechart.)

Q. Do you know whether or not any of the three persons who were present at the time the cash was counted had been hired by Mr. Remmer?

Mr. Gillen: Objected to as asked and answered. He asked him in great deal who hired who and the witness has answered.

The Court: Objection overruled.

A. Will you read the question? [657]

(Question read.)

A. You mean in the operation of the 21 Club?

Q. I am referring to the San Diego Social Club.

A. Some one must have hired the key man. I don't know who hired them. I didn't hire them.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Pechart, you were questioned here by Mr. Campbell regarding three enterprises in which you and your partner, Mr. Kessel, had an interest, to wit, 311 Club, 21 Club, and the San Diego Social Club, all in El Cerrito, California. During the same period of time did you have an interest in any other enterprise other than those three enterprises?

A. I refuse to answer the question on the grounds it may incriminate me.

Mr. Campbell: I submit to the Court it is immaterial unless it touched upon the liability of Mr. Remmer here.

The Court: I would like to get your view of that

(Testimony of Walter M. Pechart.)
in the face of that objection, Mr. Gillen. It does not seem to be material or within the range of direct examination.

Mr. Gillen: I want to know if he has any interest in any other business and I am going to ask if Mr. Remmer had any other interest by way of bonus or partnership or anything else. [658]

The Court: Objection will be overruled.

Mr. Gillen: Now the witness has declined to answer upon his constitutional grounds, may it please the Court, and the defense urges the question.

The Court: Very well. The witness will be, and is directed to answer the question.

A. Yes, I had an office in El Cerrito, a booking office.

Q. Did Mr. Remmer, the defendant in this case, have any interest in any form or manner with that enterprise by way either of partnership or investment or by way of friendship or token bonuses?

A. No, he did not.

Q. Am I to understand your testimony to be that the only interest that he had in any enterprises in which you were interested were the two clubs, the 21 Club and the San Diego Social Club and whatever might have been termed his interest by way of receiving a bonus from the 311 Club, is that correct? A. That is correct.

Q. I understood your direct testimony to be—correct me if I am in error—that the 311 Club was an enterprise that belonged exclusively to you and your partner, Mr. Kessel, is that right?

(Testimony of Walter M. Pechart.)

A. That is correct.

Q. And that so far as friendship bonus based upon percentage that was afforded to Mr. Remmer was because Mr. Remmer had opposed the opening of that enterprise, is that correct? [659]

A. Yes, he opposed the opening, but that didn't mean anything to me. It was more a matter of courtesy. It is done a great many times in the nature of business that we were in. I didn't have to give it to him.

Mr. Campbell: I ask the portion of his answer where he says it is done a great many times in the nature of business he was in be stricken.

The Court: It may stand.

Q. Your testimony was, was it not, that the 311 Club was located nearly across the street from the 21 Club and the San Diego Social Club, is that correct? A. Yes, it was.

Q. So Mr. Remmer's opposition to the opening of the 311 Club was the fact that it formed a competitive concern, that is, that it competed with the business of the 21 Club and the San Diego Social Club? A. Yes, could be so.

Q. Now at the outset of your direct examination you were asked if you recall what names were on the California liquor license to sanction the operation of the retail liquor concern or the tavern, do you recall that question? A. Yes, sir.

Q. And do you recall that you were asked specifically you remembered at one time the name of Mr.

(Testimony of Walter M. Pechart.)

Frank Cavani was on there, do you remember [660] that? A. Yes, sir.

Q. And I think you stated that you did not know how long Mr. Frank Cavani remained on the license? A. That's correct.

Q. Is it not true that Mr. Frank Cavani was to become the manager of the 21 Club, that is the restaurant and bar, but because of the death of a man by the name of Bent, who was operating the 110 Eddy establishment in San Francisco, that Mr. Cavani never did become manager of the 21 Club, but remained at the 110 Eddy Club in San Francisco?

Mr. Campbell: If he knows.

Mr. Gillen: I am only asking what he knows.

A. He left the 21 Club in El Cerrito and went over to San Francisco.

Q. Do you recall how long Mr. Cavani was at the 21 Club?

A. It was a short time, I do not remember.

Q. After he returned to San Francisco then another name was put on the license?

A. That is right.

Q. That name was the name of Mr. Billington, was it not?

A. I know he was on the license, but I am not positive.

Q. Now, Mr. Pechart, you were asked a few moments ago regarding the bonuses that were paid to persons you have described not as partners, but as employees in various activities, such as manager, cashier, general manager, floor man, and so [661]

(Testimony of Walter M. Pechart.)

on. Is it not a fact that the floor man at the San Diego Social Club was paid regularly—perhaps I am not using the right designation when I say floor man—but there was one man who was paid regularly five per cent off the top of the earnings, so that you and your partner received actually only 45 per cent and Mr. Remmer received actually 45 per cent? A. I just stated that.

Q. You stated that? A. Yes, I did.

Q. Who was that man?

A. Whoever the manager was. I don't recall; in fact—

Q. Was that the general manager?

A. Yes.

Q. With regard to the 311 Club, is it or is it not true that the 311 Club opened and closed spasmodically during the time that the 21 Club and San Diego Social Club were in operation?

A. I refuse to answer on the ground it may incriminate me.

Mr. Gillen: The defense respectfully urges the question.

The Court: The witness will be ordered, and is ordered, to answer the question.

A. Yes, it opened and closed.

Q. Over the period of time between 1943, and 1946, could you give us any idea how much of the time the 311 Club was open and how much of the time it was closed? A. No, I cannot. [662]

Q. Would it be your best recollection now that it was open and operating more than it was closed,

(Testimony of Walter M. Pechart.)

or that it was closed more than it was open and operating? A. I couldn't say.

Q. Now you were also asked regarding the incident occurring during the month of April of 1951, when you, at the request of Mr. Remmer, either personally turned to Mr. Remmer, or had turned over to him, all of the books and accounts of the 311 Club, 21 Club and San Diego Social Club. Do you recall being asked those questions?

A. Yes, I do.

Q. What is your recollection as to whether you personally turned over those records and had a receipt taken from Mr. Remmer, the receipt which is in evidence here?

A. Mr. Remmer met me on the street and asked me if I had my books back from the government, if they had been checked. I told him they had. He said he was having tax problems and wanted to know if I would let him have them.

Q. Did he tell you what he wanted them for?

A. He said he was having tax problems.

Q. Did he tell you what he wanted to do with the books?

Mr. Campbell: Objected to as calling for self-serving examination.

The Court: Objection overruled. Answer the question.

A. He said he wanted to give them to his attorneys. [663]

Q. Did you personally make the delivery to him or did you arrange to have the delivery made?

(Testimony of Walter M. Pechart.)

A. If I didn't, I had arrangements made with my accountant.

Q. And that would have been?

A. Mr. L. E. Simmons

Q. That is Mr. Lester Simmons at that time?

A. That is right.

Q. You say Mr. Remmer asked you if the government had given you back the books and were they through with them or had they checked them?

A. That is right.

Q. Had the government given you back the books at that time, that is, April of 1951?

A. Yes, they gave us back all our books.

Q. Do you recall when it was that you received the last of your books from the government?

A. No, I do not.

Q. Would it refresh your recollection that the last of your books were received from the government on the 27th day of July of 1948?

A. No, I don't know.

Q. Would it refresh your recollection that the books had been back in your hands or possession for a matter of a year or two before you turned them over to Mr. Remmer?

A. I couldn't say yes or no. [664]

Q. Now do you have any recollection now of how long the government retained those books for the purpose of making their audit or examination?

A. They were making an audit in one of our offices for at least two or three months.

Q. Now when you say in one of your offices, can

(Testimony of Walter M. Pechart.)

you describe better just what facilities you made available to the government agents for the purpose of working on those books?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer the question. Objection overruled.

A. Well, we gave them an office in the Rancho San Pablo.

Q. Where is the Rancho San Pablo in relation to your office?

A. It is across the street from our office.

Q. Is that on San Pablo Avenue? A. Yes.

Q. In El Cerrito? A. That is right.

Q. You say they worked there for two or three months on your books?

A. I wouldn't be positive. I would say a couple of months. They were in and out and would be away for a few days and come back, had books scattered all over the place for quite some time. I am not positive about the length of time, but it was rather a long time. [665]

Q. Isn't it a fact that they worked on those books between four and five months?

A. That I couldn't say.

Q. Isn't it a fact that as soon as they were through, they not only gave you your books back, but they gave you a report of their audit?

A. Yes, they gave us a report.

Q. And that was all in your possession, and had been for some time, before Mr. Remmer requested

(Testimony of Walter M. Pechart.)

you to turn the books over to him so he might take them to his lawyers for his tax problems?

A. They were not in my possession. They were in the possession of my account.

Q. Lester Simmons? A. Yes.

Q. Now isn't it a fact that the government agents who made this audit kept the books as long as they needed them and returned them to you voluntarily?

Mr. Campbell: Objected to as calling for conclusion.

The Court: That may be conclusion.

Mr. Gillen: Well, I can reframe the question, your Honor.

Q. Did you, or to your knowledge, did your counsel ever ask the government to return the books before the government agents voluntarily brought the books back without request from you?

A. That I couldn't say. [666]

Q. Were you present when those books were returned? A. No, I was not.

Q. Do you recall meeting the agents who made the audit, namely Messrs. Farley and Gould?

A. Yes, I did.

Q. Did you ever personally make a request during the period of time that those agents were making the audit of those books in the offices that you made available for them across the street from your own office, did you ever at any time personally make a request that they give you back the books?

A. No, I never did.

Q. Mr. Pechart, what is your recollection with

(Testimony of Walter M. Pechart.)

regard to the success or lack of success of the 21 Club during the period of time it was in operation? Did it lose money or make money?

A. It never made very much money.

Q. After the San Diego Social Club and the 21 Club closed down was there any time that you thereafter conducted an enterprise in the premises that had once housed the San Diego Social Club that was your own enterprise?

A. I refuse to answer on the ground it would tend to incriminate me.

Mr. Campbell: I don't think the question was finished.

The Court: Had you finished the question. Let us have the question read.

(Question read.) [667]

Mr. Campbell: I am going to object unless the question is directed at events within this indictment. Any events referred to that took place subsequent to December 31, 1946, I object to on the grounds of the question of materiality.

Mr. Gillen: I am inquiring of the witness if such a thing did exist. If it didn't exist, of course—

The Court: (Interceding): Personally I do not see where it is material, this present inquiry.

Mr. Gillen: For one reason, undoubtedly there were books kept of those enterprises that may reflect some profits that may, because of a previous action of the defendant Remmer he claims is charge-

(Testimony of Walter M. Pechart.)

able to the defendant Remmer. I want to eliminate that.

The Court: The question, as I understood it, is directed to some enterprise which this witness may or may not have conducted which was entirely his enterprise.

Mr. Gillen: That is correct, your Honor. And also may I state, your Honor, that this was introduced, this independent enterprise I am referring to now, was introduced in direct examination and testified to. Reference was made to it by the witness.

Mr. Campbell: I would like to see that.

Mr. Gillen: Very well.

Mr. Campbell: Your Honor, I think there was a question asked of the witness if he had ever rented any premises from [668] Mr. Remmer and he stated he had for a short period of two or three months, is that the question to which counsel refers?

Mr. Gillen: The testimony to which I refer appears on page 628 of the transcript, Mr. Campbell questioning Mr. Pechart shortly after recess, 3:20 p.m. of yesterday:

“Q. Mr. Pechart, I will put to you again the question which was asked you yesterday. With regard to a portion of the premises which you rented from Mr. Remmer, known as the San Diego Social Club, did you operate any business on those premises?”

(Testimony of Walter M. Pechart.)

And then the witness refused to answer and the question was pressed and the Court ordered the witness to answer:

"A. Yes, I was putting in a booking office.

"Q. What do you mean by booking office?

"A. Race horses.

"Q. And in what year was that?

"A. That I can't say. It was after the 21 Club had closed. It is a matter of record on my returns."

That was the matter, your Honor.

Mr. Campbell: It was subsequently developed, your Honor, both on direct and on cross-examination, that the only interest this witness and the defendant Remmer had in common were in relation to the operation of the 21 Club, the San Diego Social Club and the courtesy bonus, whatever it may be termed, of the 311 Club. This particular question is asking him directly as [669] to an operation of his own, and I submit that that is immaterial.

The Court: Objection will be sustained.

Q. Mr. Pechart, I am going to show you, with the Court's permission, prosecution's Exhibit 93 in evidence, and I will ask you whether or not you recognize this document or if you have ever seen it before? A. No, I have never seen it before.

Q. You will notice, Mr. Pechart, that that document is labelled, or at least printed form, of the United States partnership return income year 1944, and refers to the return of Joseph Billington, doing

(Testimony of Walter M. Pechart.)
business as the San Diego Social Club, and purports to set forth the taxable income, the gross and net taxable income of the San Diego Social Club, do you notice that?

A. I noted that on the heading, yes.

Q. Did you also notice that this document was prepared and bears both the signature and stamp of G. E. Simmons and Associates, whom I believe you have identified as the accounting firm which worked for you and your partner, Mr. Kessel, and among other accounts kept the accounts of that club, the San Diego Social Club and the 21 Club and the 311 Club? A. That is right.

Q. Do you know whether or not this return was ever filed?

Mr. Campbell: Objected to on the grounds he has previously stated he had never seen the document. [670]

The Court: He may answer.

Mr. Gillen: He might not have seen it and still know something about it.

The Court: You may answer.

A. I wouldn't swear to that. I have no signature on it. If my signature was on it, then I would probably say it was true and correct.

Q. Of course, Mr. Pechart, this is purportedly the return of the partnership and Billington.

A. I have never seen that before.

Q. So you do not know, of your own knowledge, whether this was ever returned to the government and any payment made?

(Testimony of Walter M. Pechart.)

A. I know nothing about it whatsoever.

Q. Do you know whether or not such a return was ever brought to the attention of Mr. Remmer, the defendant in this case? A. No, I do not.

Q. Now I understood you to testify—correct me if I am in error—that it was the policy, during the operation of the 21 Club and the San Diego Social Club, of at the end of each month, with the aid of the manager and cashier and persons in charge of the money, of determining what, if any, profits had been derived from the operation the preceding month, is that correct? A. That is right.

Q. And thereupon a bonus would be made up and the bonus that had been contemplated would be paid, is that correct? [671]

A. That's right.

Q. And the persons who had a partnership interest; namely, Mr. Kessel, yourself and Mr. Remmer, their shares of any profits would be divided up in accordance with the percentage to which they were entitled, is that correct?

A. That is right.

Q. I understood you to testify also that you were usually present when those divisions were made out at the end of the month?

A. That is right.

Q. And do you recall any occasion when Mr. Remmer was ever present when those divisions were being made at the end of the month?

(Testimony of Walter M. Pechart.)

A. I think all the time I was associated with him he was there only once or twice.

Q. You say in all the times you were associated with him he was there only once or twice. My concern in this question is whether or not he was ever present at the end of the month on the occasion when the divisions of profits would be allocated?

A. Either once or twice.

Q. That he was present when there was a division of profits? A. Yes.

Q. Do you know, of your own knowledge, of the other occasions what, if anything, was done with whatever share was due Mr. Remmer?

A. It was put into a large envelope and the manager put it in [672] the safe.

Q. And do you know whether or not it ever reached Mr. Remmer personally or whether it was sent over to his San Francisco bookkeeper?

A. I know nothing about that.

Q. In other words, all you know, when Mr. Remmer's share was determined and allocated, it was put in an envelope and given to the manager and the manager put it in the safe?

A. That is right.

Q. Who got it after that, if you know?

A. I don't know.

Q. On the two occasions when you say Mr. Remmer was present, did the same thing occur, put in an envelope and put in the safe?

A. That I couldn't say.

Q. Mr. Pechart, do you recall whether or not

(Testimony of Walter M. Pechart.)

you ever advised Mr. Remmer, whether you personally ever advised Mr. Remmer, as to what, if any, share he had received by way of profit at any time during the operation of the clubs?

A. Did I ever advise him?

Q. Did you ever tell him he made so much last month or this month? A. No.

Q. And you have no knowledge of what knowledge Mr. Remmer may [673] have gained personally as to any profits that he took out of that enterprise? A. None whatever.

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. Mr. Pechart, I would like to get straight in my own mind—I am apparently confused about it—as to the five per cent paid to the general manager. Mr. Gillen referred to the fact that five per cent was taken off the top of the profits; is that the manner in which it was handled?

Mr. Gillen: I think counsel misstated the question.

Mr. Campbell: I will withdraw the question in that form.

Q. In what manner was it actually handled?

Mr. Gillen: Objected to as asked and answered both on direct and cross-examination.

The Court: Objection overruled. Answer the question.

(Testimony of Walter M. Pechart.)

A. I think—I am not positive, whether it was five or ten per cent, something tells me it was ten, I am not sure—it was taken off the top and the balance was divided.

Q. In other words, first the percentage bonuses were taken off; is that correct?

A. That is correct.

Q. And then the balance was divided, 50 per cent to Mr. Remmer and 50 per cent to you and Mr. Kessel? A. That's right. [674]

Q. And as I understand, you are not positive at this time as to whether it was five or ten per cent to the general manager?

A. No, I am not, but it is on the records.

Q. Now with regard to the examination of the records of the 21 Club and the San Diego Social Club and the 311 Club by the revenue agents, which you referred to on cross-examination, was their examination confined to the records of those three clubs, or did that embrace other records?

A. All of my enterprises.

Q. All of your enterprises? A. Yes.

Q. And were those records carried away with them or were they examined on the premises of one of your enterprises?

A. I know they couldn't have carried them all away. They may have taken some; I can't swear to it.

Q. Do you know whether they took any away?

A. No, I do not.

Q. Isn't it a fact that the period of time that

(Testimony of Walter M. Pechart.)

they were working on the examination of all of your organizations, that that work was done in a room provided by you on those premises known as the El Rancho San Pablo? A. That's correct.

Q. Now you stated, I believe, in response to Mr. Gillen's question, that Mr. Remmer met you on the street sometime in April of this year and stated that he had tax problems and wanted the [675] records of the 21 Club and San Diego Social Club and 311 Club for his attorney. You recall that testimony? A. Yes, sir.

Q. Now isn't it a fact that those records, or at least a portion of them, had previously been in the possession of his attorney?

A. That I do not know.

Mr. Gillen: We will stipulate that they were. We will stipulate a portion of the records were shown to an attorney by the name of Kessler, whom I believe is related to Mr. Kessel and who practices law in Oakland, turned over some account books to Mr. Golden for a brief period of time and were returned by Mr. Golden to Mr. Kessler approximately in April of 1951.

Mr. Campbell: I think that is indicated by this receipt.

Mr. Gillen: That is right.

Q. Incidentally, do you know Mr. Kessler?

A. Yes, I do.

Q. Was he, and is he, an attorney employed by you and your partner? A. Yes, he is.

Q. And are you familiar with the fact, as stated

(Testimony of Walter M. Pechart.)
in the stipulation, that certain of the records were turned over to Mr. Golden?

- A. No, I did not know that.
- Q. You did not? [676] A. I did not.
- Q. You, therefore, don't know what records were turned over? A. No, I do not.
- Q. Now with regard to the examination made by the revenue agents at Rancho San Pablo, you would say of all your organizations the records of these three clubs constituted what portion of your records? I am referring to bulk.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. We are only concerned with records—

The Court (Interceding): Well, see what the answer is. Read the question, please.

(Question read.)

A. Only a small portion.

Mr. Campbell: I think that is all.

Recross Examination

By Mr. Gillen:

Q. Mr. Pechart, with regard to the examination by the revenue agents, it is true, is it not, that the records of the three clubs which were introduced here, as well as records of any other enterprise in which you were personally interested, were all kept in your accountant's office, which was in the same building as your office is located; is that correct?

A. No, not all the records. We had records—

(Testimony of Walter M. Pechart.)

Q. Let me—

Mr. Campbell: May he finish his question?

Mr. Gillen: I am going to interrupt something that might [677] shorten this. I will withdraw the question and put another question.

Q. With regard to the records that were taken over across the street to the Rancho San Pablo, were all those records kept in your office or your accountant's office on the other side of the street when the revenue agents came over to get them or to look at them? A. No, they were not.

Q. Well, let me ask you if this isn't what occurred: Isn't it true that the revenue agents, when they appeared and stated that they desired to make an audit of all your books and records, on seeing the volume of them asked that they might be provided with some place where they could work and wouldn't have to carry them around?

A. That is right.

Q. And you voluntarily provided them with this office in this empty former club across the street, the Rancho San Pablo; is that correct?

A. That is correct.

Q. And they took over there whatever records they needed and worked? A. That is true.

Q. And I presume they came back and forth to get certain records at certain times and brought back certain records; is that true?

A. That is right. [678]

Q. With regard to the percentage that was paid by way of bonus to the so-called key men or top

(Testimony of Walter M. Pechart.)

men, is it your recollection that, whether it was 5 per cent or 10 per cent, that you and your partner paid that percentage and Mr. Remmer paid that percentage?

A. That is right. I made that statement.

Q. So if it was five per cent, you and your partner would retain 45 per cent of the profits between you and Mr. Remmer would retain 45 per cent?

Mr. Campbell: Objected to because—

The Court: You may answer.

Q. Do you have that in mind?

A. Yes, I do, very clearly. As I stated before, I am not positive; it is either five or ten per cent, but I believe it was ten; that would be five per cent off Mr. Remmer and five per cent off Pechart & Kessel.

Q. You mean a total of 10 per cent?

A. That is right.

Q. You know you paid five or ten per cent and Mr. Remmer paid five or ten per cent?

A. Yes.

Q. Was it within your knowledge that Mr. Remmer also paid to certain so-called key men there in addition some bonus? A. Yes, he did.

Mr. Gillen: That is all. [679]

The Court: Any reason why Mr. Pechart could not be finally excused?

Mr. Gillen: No reason on the part of the defendant.

Mr. Campbell: No, your Honor.

The Court: Mr. Pechart will be excused. The same order will be made.

Mr. Thompson: At this time I would like to read letter from Theodore M. Monell, attorney at law, San Francisco, dated November 28, 1951, a duplicate of which was sent to defendant's counsel, and at this time I would like to read the letter as the testimony of Mr. Monell.

Mr. Gillen: May it be explained by counsel that the defense has stipulated if Mr. Monell was present—I know he was present here for two days—if he returned and appeared on the witness stand, we have stipulated that he would testify to the matters that appear in his letter as they appear in his letter.

Mr. Thompson: That is correct.

The Court: You may proceed.

TESTIMONY OF THEODORE M. MONELL

as read by Mr. Thompson.

Mr. Gillen: May it be understood our stipulation that this be received is subject to any correction that may appear in any records or matters that should develop later; that is, if the books or records should disclose any need for correction?

The Court: We will meet that as it comes. [680]

Mr. Thompson: I would like the letter I just read marked as an exhibit.

Mr. Gillen: It is read into the record.

The Court: I do not think there is any necessity of marking it as an exhibit.

Mr. Thompson: Your Honor, I have asked

marked as one exhibit document entitled "Eserow Instructions," dated October 17, 1946, a document entitled "Assignment," to which is attached a lease dated July 23, 1946; a document on the letterhead of Theodore M. Monell, dated October 17, 1946, and a document purporting to be a wholesale inventory of the Transit Smoke Shop, and I now offer these in evidence as plaintiff's Exhibit 97.

Mr. Gillen: These, I take it, are the papers that reflect the transactions that Mr. Monell wrote about.

Mr. Thompson: Those were papers produced by Mr. Monell and examined by myself and Mr. Golden together two or three days ago.

Mr. Gillen: We stipulate that these may be offered in evidence by the prosecution, subject to any corrections that may arise during the course of the trial.

The Court: They may be admitted in evidence.

Mr. Gillen: We stipulate that that exhibit may go in evidence, subject to motion to strike if it is not connected with the defendant.

Mr. Thompson: That is satisfactory. [681]

The Court: That is satisfactory.

Mr. Thompson: (Reads Exhibit 97.)

GORDON PARTEE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. Gordon Partee.

Q. Where do you reside?

A. San Francisco; 433 - 14th Avenue.

Q. What is your business?

A. I am in business in Burlingame now, bar and restaurant.

Q. Are you acquainted with Mr. Elmer Remmer, the defendant in this case? A. I am.

Q. During the summer of the year 1945 did you have a conversation with Mr. Remmer?

A. I remember it was '45 I had a conversation with him.

Q. Is that your best recollection as to the time of the conversation?

A. It was during sometime I was vacationing at Lake Tahoe.

Q. Where in Lake Tahoe did the conversation occur? A. Cal-Neva Lodge.

Q. Was anyone else present that you recall?

A. Not to my knowledge. [682]

Q. What was the conversation you had with him at that time?

A. Just a casual conversation, wherein he mentioned at the time that in the future he might be

(Testimony of Gordon Partee.)

interested in the same kind of business in San Francisco, namely, in a cigar store; that it might work out that the two of us could work a deal together. In other words, he was interested in going into business with me in a cigar store venture of that type.

Q. That was the whole substance of his conversation, is it?

A. In essence it was; it was very short.

Q. Some months later did you have occasion to talk with Mr. Remmer about the same subject matter? A. Yes, quite some time later.

Q. And where did that conversation take place?

A. I am not sure whether it took place in his office on Mason Street or on the street; I am not positive.

Q. It was in San Francisco at any rate?

A. Yes, it was in San Francisco.

Q. And do you recall if anyone else was present at that time? A. No, I don't.

Q. What was the conversation you had with him at that time, as you recall?

A. At that time we talked about Lake Tahoe and just mentioned I had a place in mind that he might be interested in, that I thought would be a good location, and we discussed the purchasing or if he would still be interested in the business [683] venture he had talked about when we spoke at Lake Tahoe.

Q. What was the discussion you had in regard to the purchase of it?

(Testimony of Gordon Partee.)

A. I told him I had a place I thought could be bought and might be a good business.

Q. And did you tell him what the place was you had in mind? A. No, I told him where it was.

Q. Where was it?

A. It was a going business, an established business, on 85 First Street.

Q. Did you discuss with him the proposed terms of the purchase?

A. Well, we discussed approximate price. I didn't think there was any—

Q. (Interrupting): Do you recall what approximate price was mentioned?

A. No, because I knew that the place could be bought, but it was a matter of deciding if he wanted to buy it before it then became a matter of negotiation with the people who owned it and myself. In this particular case I did all the talking to them.

Q. What, if anything, did Mr. Remmer tell you with regard to your proposal?

A. He was interested in buying.

Q. Did Mr. Remmer remain in San Francisco after that conversation?

A. No, sir. Shortly after that he left. It was a matter of [684] talking back and forth for a period of maybe a week.

Q. You had several conversations with him; is that correct?

A. I am talking now with the people who owned the Transit Smoke Shop.

Q. And then Mr. Remmer left San Francisco?

(Testimony of Gordon Partee.)

A. He wasn't in town, to my knowledge.

Q. Prior to leaving San Francisco, did he make any suggestion to you with regard to seeing anyone else?

A. He asked me to discuss it with Mr. Kyne.

Q. Did you finally consummate a purchase of the business that you were discussing?

A. Yes, we did.

Q. What was the name of that business?

A. Called the Transit Smoke Shop.

Q. Do you recall now what sums of money you paid for the business?

A. Well, I have, I think, a figure of 22 thousand dollars. The total amount paid for the business was \$30,511, \$8,511 of which was for the merchandise, as you read in Mr. Monell's letter, the wholesale value of the merchandise.

Q. And the balance of the money was for the business itself and the lease; is that correct?

A. Liquor license, lease, and so on—no, not the lease. The lease didn't have anything to do with that, but goodwill, and so on. [685]

Q. Did you handle any of that sum of 30 thousand some dollars? A. I handled most of it.

Q. To whom did you pay it?

A. Who did I give the money to?

Q. Yes.

A. I gave one check—I guess all the money was paid to Mr. Monell.

Q. From whom did you receive the money that you paid to Mr. Monell? A. Mr. Kyne.

(Testimony of Gordon Partee.)

Q. That is Mr. William Kyne?

A. William Kyne.

Q. You first paid a sum of five thousand dollars; is that correct?

A. I think that is correct, yes.

Q. And did you receive that five thousand dollars from Mr. Kyne? A. I did.

Q. In what form was it given to you?

A. Well, if my memory is correct, I just went down to the office on Mason Street and I think I had phoned previous to the time of going and told them I expected to have the five thousand as a deposit, goodwill deposit or something of that nature, and the check was waiting for me when I got there. I doubt if he even handed it to me; it was in an envelope.

Q. Then you delivered that check to [686] Mr. Monell? A. Mr. Monell.

Q. And a few days later you made a payment of 17 thousand dollars?

A. Within a short period of time as negotiations went on; that is correct.

Q. From whom did you obtain that money?

A. Mr. Kyne.

Q. Where did you receive it?

A. I walked up to the Bank of America, No. 1 Powell Street, the Day and Night Branch, stayed in the foyer of the bank and then in a little while Mr. Kyne came with the check.

Q. You walked over with Mr. Kyne; is that correct? A. That is correct.

(Testimony of Gordon Partee.)

Q. And you waited for Mr. Kyne and he came back with the money? A. Yes.

Q. And he gave you a check for 17 thousand dollars? A. That is right.

Q. And you delivered that check to Mr. Monell?

A. That is correct.

Q. Another payment of \$8,511.01 for the inventory of the business, where did you obtain that money?

A. It was obtained in the same manner.

Q. From Mr. Kyne? A. From Mr. Kyne.

Q. Did you, yourself, use any of your own personal funds in [687] making the purchase of the business known as the Transit Smoke Shop?

A. I did not.

Q. Who is Mr. Benjamine Partee?

A. That is my brother.

Q. Was Mr. Benjamine Partee at any time interested as a partner or owner or otherwise in the business known as the Transit Smoke Shop?

A. No, he was not. He had nothing to do with it.

Q. You handled the entire transaction yourself and for yourself; is that correct?

A. That is correct.

Q. And you and Mr. Remmer and Mr. Kyne enter into a written partnership agreement regarding the Transit Smoke Shop?

A. There was an agreement made.

Q. Have you, pursuant to subpoena, produced that agreement?

A. It may seem funny, but I had it here with

(Testimony of Gordon Partee.)

me, but at some time in the period of time I was here I lost it.

Q. You lost it at the Mapes Hotel?

A. Yes, sometime. I don't know how it happened, but I just lost it.

Mr. Gillen: If this is a correct or photostatic copy, the defense will stipulate it may be used in lieu of the original which was lost by Mr. Partee.

The Court: We will take a recess at this [688] time.

(Jury and alternate jurors admonished and 15-minute recess taken at 2:30 p.m.)

2:45 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. PARTEE

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Thompson: Your Honor, I now offer in evidence plaintiff's Exhibit 98, which is agreement dated November 21, 1946, between Gordon Partee, Elmer Remmer and William Kyne.

Mr. Gillen: I think we have a surprise for you. I think Mr. Partee's original agreement was found on the floor.

A. It was found on the floor.

(Testimony of Gordon Partee.)

Mr. Thompson: I offer it in evidence, your Honor.

Mr. Gillen: No objection.

The Court: Exhibit 98 is admitted in evidence.

Q. Mr. Partee, I show you Exhibit 98; do you recognize the signatures on the third page of the exhibit? A. Yes, I do.

Q. Whose signatures are they?

A. Mine, Elmer Remmer and William E. Kyne.

Q. And that agreement provides in part that you shall have 50 per cent interest in the Transit Smoke Shop, Mr. Remmer a 25 per cent interest, and Mr. Kyne a 25 per cent interest? [689]

A. That is right.

Q. In connection with the starting of that business, Mr. Partee, were there other expenses in addition to the sums to which you have already testified?

A. There was one other expense to add and that would be deposit we had to put on the lease, total of \$1,500, three years at \$500 per month.

Q. Do you mean three years or three months?

A. \$1,500 was deposited, I guess for the last three months' rent at the end of the lease. In other words, we had to put up \$1,500.

Q. From what source did you receive that \$1,500? A. The same way.

Q. From Mr. Kyne? A. Yes.

Q. Did you also establish a change fund for the business?

A. There was a change fund established; I couldn't tell you the exact amount.

(Testimony of Gordon Partee.)

Q. Can you approximate the amount, according to your best recollection?

A. To my best recollection, it would be about a thousand dollars.

Q. From whom was that money obtained?

A. I do not remember.

Q. I call your attention, Mr. Partee, to plaintiff's Exhibit 98, agreement, wherein it is recited that the second parties, namely, Elmer Remmer and William E. Kyne, contributed the sum of [690] \$32,011.01 to the capital assets of the partnership.

A. That figure is correct.

Q. That is the figure you arrived at at the time the agreement was executed? A. Yes.

Q. And that is the only contribution to the capital, is that correct? You, yourself, made no contribution? A. No contribution.

Q. In defining the partnership interests, I think I incorrectly read the agreement to you. If you will examine the third paragraph of the agreement, would it not be more correct to say that you had a 50 per cent interest and Mr. Kyne and Mr. Remmer together had a 50 per cent interest, according to the agreement?

A. That is right. It is better to put it that way. If we had \$100, I would take \$40 and Mr. Kyne would take \$25 and Mr. Remmer take \$25.

Q. Is that the manner in which the profits of the partnership were divided? A. It is.

Q. When were partnership profits distributed?

(Testimony of Gordon Partee.)

A. Within the period month, according to how the check was done.

Q. At the end of the month you would write a check for yourself for 50 per cent of the profits and one to Mr. Remmer for 25 per cent and one to Mr. Kyne for 25 per cent? A. That's right. [691]

Q. Was the business operated under that ownership and under those conditions continuously to the end of 1946, that is, that year?

A. Yes. We were in business perhaps maybe a month and a half during the period of 1946, from November 15, 1946, to the end of the year.

Q. Then you continued in business for 1947 also?

A. Yes, went on.

Q. Did you file an income tax return for the partnership in the calendar year 1946, that is, for the two months' of operation? A. Yes.

Q. I show you plaintiff's Exhibit 92, and state whether or not that is the partnership return which you filed for the Transit Smoke Shop business?

A. I would say it is. I see my signature on it and it is a partnership return.

Q. There is a typographical error, is there not, on the return, where your name is spelled Parter?

A. That is correct.

Q. What character of business was operated by the Transit Smoke Shop during the year 1946?

A. Well, we had located on a street that is quite heavily trafficked, right near the terminal, and we had a regular merchandising store, we had liquor, was open 24 hours, day and night; we had pin-ball

(Testimony of Gordon Partee.)

machines, cigars, I believe I mentioned liquor, merchandise, magazines. [692]

Q. Was there a back room to the business?

A. No back room; one large store. Oh, there was a back room, I mean we used it for storing liquor and storage space, but I mean the store was one large room.

Mr. Thompson: At this time, your Honor, I would like to read to the jury a portion of the figures from Exhibit 92, the partnership return for the Transit Smoke Shop for the calendar year 1946, covering the period from November 1, 1946, to December 31, 1946. Total net income after business deductions was \$8,797.82, less salaries and wages, rent and repairs and the like, left an ordinary net income of \$3,809.04, and that sum was distributed as follows: Gordon Partee, 85 First Post Street, San Francisco, percentage of time devoted to business, 50. His distributive share was \$1,904.52. Elmer F. Remmer, Orinda, percentage of time devoted to business, 25. His percentage share was \$952.26. William E. Kyne, 975 Lawton Street, San Francisco, percentage of time devoted to business, 25; distributive share, \$952.26; total, \$3,809.04.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Partee, you spoke in your direct examination of a conversation had between you and Mr. Remmer at Cal-Neva Lodge on Lake Tahoe during

(Testimony of Gordon Partee.)

the summer of 1946, when you were vacationing there; is that correct?

A. It could have been '45; I am not sure of the year, '45 or '46. [693]

Q. And you said that there was some mention in the conversation about the possibility of your going in business with him? A. Yes.

Q. Now it is true, is it not, Mr. Partee, that you are a former football star of St. Mary's College?

A. Thank you, yes.

Q. And that you belong to the St. Mary's College Alumni? A. Yes.

Q. And Mr. Remmer also attended St. Mary's and belonged to the Alumni; is that correct?

A. Yes.

Q. And you struck up your conversation by your both having attended the same educational institution?

A. Yes, I had met Mr. Remmer, I think, at a game or something, just casually.

Q. And this mention of business was a casual thing and at a later time you observed this location which you thought was a good potential business place? A. That is correct.

Q. You mentioned that it was quite a well-traveled portion of San Francisco. It is right in the path of the East Bay terminal, that takes the traffic across the Bay Bridge; is that correct?

A. That is correct, all the traffic.

Q. Both human and vehicular traffic?

A. That's right. [694]

(Testimony of Gordon Partee.)

Q. Also it is closely located, is it not, to some large steamship and railroad office buildings, within a short distance?

A. All of that vicinity is generally office buildings. I am not sure about train terminals.

Q. I mean, you were close to the Southern Pacific building, the main office?

A. The Western Pacific.

Q. And the Matson Navigation Company is in close proximity; is that correct? A. Yes.

Q. And finding this location, you proposed this as a likely place to go into business?

A. That is right.

Q. Now, Mr. Partee, on the occasions that you have mentioned when you went to the bank with Mr. Kyne and he gave you the money for these two payments, as I recall, did Mr. Kyne on those occasions take cash to the Day and Night Branch of the Bank of America at No. 1 Powell Street, San Francisco, and obtain a cashier's check for you?

A. I wouldn't know about that. I never saw any cash at any time.

Q. You don't know how he purchased the cashier's checks? Were they cashier's checks?

A. Yes.

Q. So when you spoke to Mr. Kyne about the necessity of [695] meeting, for instance, the 17 thousand dollar payment, you and he went to the bank together and you waited until he transacted the business of obtaining the cashier's check?

A. That is correct.

(Testimony of Gordon Partee.)

Q. And whether he paid cash or whether he wrote a check on the account, you don't know?

A. No.

Q. Now do I understand correctly, Mr. Partee, that you conducted the operation there yourself?

A. That's right.

Q. And you kept your accounts down there, and what did you do with the final accounting in the preparation?

A. I kept a regular daily running account that at the end of the month I would bring all of the business or all the records that pertained to the business down and leave them in Mr. Remmer's office.

Q. I notice in prosecution's Exhibit 92 the preparation was made by a Mr. C. D. Ayton, public accountant. Did you turn over your records to him?

A. That is correct.

Q. He was the man who was keeping the books for Mr. Remmer and Mr. Kyne?

A. That is right.

Q. And I notice on this exhibit there is a signature, purported signature, of Gordon A. Partee, I believe you have already [696] identified that for Mr. Thompson as your signature; is that true?

A. Yes.

Q. Insofar as you can recall, at the time you signed this document and now, when it is shown to you, does that truly reflect the earnings, disbursements, and whatever of the Transit Smoke Shop?

A. It does.

Mr. Gillen: I think that is all; thank you.

Mr. Thompson: That is all, Mr. Partee.

(Witness finally excused.)

JAMES OGLESBY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. James Oglesby.

Q. Where do you live?

A. 433 Baden Street, San Francisco.

Q. What is your employment?

A. Business manager, Franklin Hospital in San Francisco.

Q. Where is the Franklin Hospital located?

A. 14th & Noe Streets, San Francisco.

Q. Have you brought with you, in accordance with subpoena, the original records of the Franklin Hospital relating to the account of Elmer Remmer?

A. I have. [697]

Q. Have you from those records, which appear to be quite bulky, made a transcript of his account?

A. I have.

Q. Will you produce it, please?

Mr. Gillen: We will stipulate Mr. Remmer had pneumonia and was in the hospital and paid this amount of money.

Mr. Thompson: We do not accept the stipula-

(Testimony of James Oglesby.)

tion, your Honor. We offer in evidence Exhibit 99.

Mr. Gillen: We stipulate it may go in evidence without objection.

The Court: It may be admitted.

Q. Mr. Oglesby, I show you Exhibit 99. Will you state during what period Mr. Remmer was a patient in the Franklin Hospital?

A. From February 7, 1946. This does not indicate the date of his discharge. I think it was February 14, 1946.

Q. And did Mr. Remmer pay you for the services performed for him by the Franklin Hospital?

A. Yes, he did.

Q. On what date? A. February 14, 1946.

Q. And in what amount? A. \$279.38.

Mr. Thompson: You may cross-examine.

Mr. Gillen: My only question would be, from my personal experience, how it was so reasonable. I think I have no further [698] cross-examination.

(Witness finally excused.)

WILLIAM B. STRONG

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. William B. Strong.

Q. Where do you live?

A. 1315 Monroe, Evanston, Illinois.

(Testimony of William B. Strong.)

Q. What is your business?

A. I am credit manager for the Blackstone.

Q. The Blackstone Hotel? A. Yes, sir.

Q. Where is the Blackstone Hotel?

A. 636 Michigan, South Michigan.

Q. In Chicago, Illinois?

A. Chicago, Illinois.

Q. How long have you been employed at the Blackstone Hotel? A. Oh, seven years.

Q. Have you brought with you an account of the Blackstone Hotel relating to Elmer Remmer?

A. I have.

Q. Will you produce it, please? You have produced a transcript you made from your hotel records? A. That's right. [699]

Mr. Thompson: I ask that the transcript be marked plaintiff's exhibit next in order.

The Clerk: 100.

Mr. Thompson: I would like to have marked for identification, your Honor, the record account with Mr. Remmer with the Blackstone Hotel.

Mr. Gillen: Would that be the originals?

Mr. Thompson: Yes.

Mr. Gillen: May we call that 100-A?

Mr. Thompson: That is satisfactory.

Q. Mr. Strong, I show you plaintiff's Exhibit 100-A for identification; will you state generally what those are?

A. What was it you wanted to know about this one?

Q. What are they in the way of records?

(Testimony of William B. Strong.)

A. Well, that is the active, the only record we have, I mean; it is the front office guest register as they set up the ledger sheets, such as this, and those are posted thereon.

Q. And are those the records of the Blackstone Hotel which are kept, made and maintained in the regular course of the business of that hotel?

A. That is right.

Q. And is it part of the business of the Blackstone Hotel to make and keep records of that character? A. Oh, yes.

Q. Do these records record payments made to the Blackstone Hotel [700] by Mr. Elmer Remmer during the years 1945 and 1946? A. Yes.

Mr. Thompson: I offer Exhibit 100-A in evidence, your Honor.

Mr. Gillen: To which we offer the objection, may it please the Court, there is no proper foundation laid. In other words, may it please the Court, to clarify the grounds of my objection, there must be a foundation laid to show whether or not these were personal or pleasure accounts or whether they were account of obligations incurred as business expenses. That would be material, because they would be deductible business expenses, so the offer is premature, may it please the Court. There would have to be that foundation laid.

Mr. Thompson: If the Court please, I believe a number of witnesses have testified already at the trial that Mr. Remmer's business was conducted at Cal-Neva Lodge and San Francisco, California.

(Testimony of William B. Strong.)

The Court: Objection overruled. They may be admitted in evidence.

Mr. Gillen: I challenge the record to show that his business—

The Court (Interceding): I wasn't interested in that point of view.

Mr. Gillen: May I make a record, your Honor? Counsel has made a statement that I think would tend to confuse the [701] triers of fact.

The Court: You may make your statement.

Mr. Gillen: The witnesses who testified here did not confine Mr. Remmer's business or his business trips or his business activities to Cal-Neva or San Francisco or El Cerrito. They testified there were businesses there.

The Court: The jury will determine what the witnesses testified.

Mr. Gillen: Of course, your Honor, if these are business trips, it is material. They are deductible.

The Court: That may be shown. If that is shown—

Mr. Gillen (Interrupting): Of course, the burden is entirely to show on the government, your Honor. We do not have to prove, the burden is on the prosecution, as your Honor well knows.

The Court: The objection is overruled. The ruling will stand.

Q. Mr. Strong, I show you Plaintiff's Exhibit 100-A and by examining that exhibit, will you state what, if any, payments were made by Mr. Remmer to the Blackstone Hotel in the year 1945?

Mr. Gillen: Same objection, no foundation laid.

(Testimony of William B. Strong.)

The Court: Same ruling.

Mr. Gillen: I would like to recall to your Honor's mind, if it has slipped your mind, that there was some evidence produced by the prosecution here that Mr. Remmer had some business [702] activities in the East, to wit, the purchase of two carloads of whiskey.

The Court: The ruling will stand. Let us have the question.

(Question read.)

A. Yes, October 31, 1945, \$36.23 and November 11, 1945, \$118.73. I believe those are the only two in '45; and October 14, \$58.77.

The Court: That is 1945?

A. Yes, sir.

Q. Do you find a payment under date of October 2, 1945? A. Four hundred dollars.

Q. Do you also find a payment under date of October 7, 1945? A. Yes, two thousand.

Q. According to your records, at the time Mr. Remmer paid you that sum of two thousand dollars, did he owe the hotel two thousand dollars?

A. No, he didn't. That could have been a check that we put through there. I don't recall just what that was.

Q. As a result of that payment of two thousand dollars, was Mr. Remmer given a credit on the hotel account? A. That's right.

Q. And after that sum of two thousand dollars was paid by Mr. Remmer, what amount remained

(Testimony of William B. Strong.)
to the credit of Mr. Remmer with the Blackstone
Hotel? [703]

Mr. Gillen: Objected to as assuming something not in evidence because the witness has said it might have been cashing of check and leaving the greater portion of the check there as balance.

The Court: The question before that did state something about credit.

Mr. Gillen: That is right, but he said it might not be payment, he said it might be a check cashed and leaving a balance.

The Court: Objection will be overruled. Read the question.

(Question read.)

A. \$1,878.10.

Q. What, if any, payments were made by Mr. Remmer to the Blackstone Hotel during the year 1946?

A. Yes; June 25, \$123.50; October 6, \$120.83; November 16, \$77.57.

Q. Referring back, Mr. Strong, to the credit balance which Mr. Remmer had after paying the hotel the sum of two thousand dollars, do your records show whether or not that payment was used up by Mr. Remmer in hotel services or was any sum of that refunded to him?

A. Well, yes, there was a refund made to him.

Q. Will you refer to your record and state the date of the refund and the amount of the [704] refund? A. You have it on—

(Testimony of William B. Strong.)

Q. (Interrupting): Well, you have it in there, that is the one we are referring to, Exhibit 100-A. Refer to the date of October 3, 1945.

A. October 31, 1945, \$1,392.56.

Q. Does the record which you have before you, Exhibit 100-A, show the daily charge for the room occupied by Mr. Remmer on the occasions when he visited the Blackstone Hotel?

A. Well, when he paid this, it was \$10.00, \$10.00 room.

Q. On what date was it that he occupied a ten dollar room? A. October 30th.

Q. What year? A. 1945.

Q. Will you go on through the exhibit and see if you find any other room rents paid by Mr. Remmer?

A. November 9th, \$10, and then he had a suite here.

Q. What date was that?

A. He came on the 24th of September, 1945, and he had a suite, paid \$26.50 a day for that and kept that until October 14th.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Strong, due to the fact that your records reflect a refund, you would say, would you not, that Mr. Remmer apparently cashed a check for two thousand dollars and took cash of \$200 and left \$1,800, which was the balance to him, less the two hundred? [705] A. It is a credit, yes.

(Testimony of William B. Strong.)

Q. Instead of taking money away, he left it there with the cashier, is that correct?

A. I would say so.

Q. And then in the interim there were some modest charges made there, such as the ten dollar rooms and finally he drew down what remained to his credit on your books, the sum of \$1,392.50, is that correct? A. That is correct.

Q. This suite you mention for \$26.50 a day, is that the type suite usually used for business purposes, business conferences and the like?

A. Yes.

Q. You wouldn't know from your records, of course, Mr. Strong, whether or not the occasions of his visits to your hostelry were on business trips or on pleasure trips? A. No, I wouldn't know.

Mr. Gillen: That is all.

Redirect Examination

By Mr. Thompson:

Q. Will you describe the suite that Mr. Remmer hired for \$26.50 a day?

Mr. Gillen: What materiality would that have? It was more than one room.

The Court: Objection overruled. Answer the question.

Mr. Gillen: I will offer the further [706] objection—

The Court: I have already ruled.

Mr. Gillen: May I offer a further objection?

(Testimony of William B. Strong.)

The Court: Well, go ahead.

Mr. Gillen: This man can not know from his records what the suite was.

Mr. Thompson: We are trying to find out, your Honor.

The Court: Just a minute. The objection is overruled. He may answer the question.

A. Well, consisted of parlor and bedroom; in this case, it was two bedrooms.

Q. Two bedrooms and parlor. Are those suites used only for business purposes?

Mr. Gillen: Objected to as calling for conclusion.

The Court: Objection overruled.

A. Well, yes.

Q. Only for business?

A. Oh, no, no; not only for business.

Q. Is your hotel patronized exclusively by business men? A. I would say so.

Q. Exclusively? A. Yes.

Q. Nobody that comes to your hotel for pleasure?

Mr. Gillen: Now he is cross-examining his own witness. It is improper redirect examination, certainly. He is trying to impeach the gentleman. [707]

The Court: Well, reframe the question.

Q. Is your hotel, Mr. Strong, the Blackstone Hotel, used only by people who come to Chicago on business?

Mr. Gillen: Objected to as calling for opinion and conclusion and speculation on his part.

(Testimony of William B. Strong.)

The Court: Objection overruled. Answer the question.

A. Well, I imagine business and pleasure, yes, whatever any hotel would be used for.

Q. Just like any other hotel?

A. I think so, yes.

Q. Will you refer to your record, Exhibit 100-A, which I believe you have there before you, and state whether or not, on the date that Mr. Remmer paid to the hotel the sum of two thousand dollars he owed the hotel any money?

Mr. Gillen: I am going to offer objection now, in view of the cross-examination, it is assuming something which is not in evidence. There is no evidence here now—we have explained that he did not pay the hotel two thousand dollars, that he left a credit on the books, which was refunded to him in the sum of thirteen some odd dollars.

The Court: Objection overruled. Answer the question.

(Question read.)

A. Yes, \$121.90.

Q. And the credit balance which remained to the credit of Mr. Remmer, after the payment was made, was arrived at after deducting [708] the amount that he owed the hotel?

A. That is correct, yes.

Mr. Thompson: That's all.

(Testimony of William B. Strong.)

Recross-Examination

By Mr. Gillen:

Q. So, in other words, on that occasion he just paid what he owed the hotel, \$121.90, took \$100 and left the rest in credit? A. That's right.

Q. So he did not pay the hotel two thousand dollars, did he? A. No.

Q. Do you have the number there of the suite which he occupied? A. At that time?

Q. At the time he paid the \$26.50 a day?

A. Oh, yes; 504-5 and 6.

Q. And that consisted of sitting room and two bedrooms, is that correct? A. Yes.

Q. Now is it the practice of your hotel, as it is the practice of many hotels, if a man takes a suite he may have another man with him and only one man's name is put down, whoever takes the suite?

A. That is correct.

Mr. Gillen: That's all.

Mr. Thompson: That is all.

(Witness finally excused.) [709]

FRANK A. BRAY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Frank A. Bray.

(Testimony of Frank A. Bray.)

Q. Where do you live?

A. 2539 30th Ave., San Francisco.

Q. What is your business?

A. I am controller of Shreve & Company.

Q. What character of business is conducted by
Shreve & Company?

A. Jewelry and silversmiths.

Q. Where is that business located?

A. At 200 Post Street.

Q. Have you brought with you the records of
Shreve & Company relating to an account with
Elmer Remmer? A. I have.

Q. Will you produce them, please? I ask the
record be marked Exhibit 101.

The Court: So marked.

Mr. Gillen: The defense, may it please the
Court, would have no objection to this exhibit being
received in evidence, with the exception there is a
payment that was made in 1947, pertaining to ob-
ligations incurred in 1946. Of course, that would
mean that the obligations incurred should be elimi-
nated and also the payment of 1947, because we are
only concerned with [710] what was paid in the
years involved in the indictment.

Mr. Thompson: That is correct, your Honor.
We are interested only in payments made during
the years 1944, 1945, and 1946.

Mr. Gillen: Otherwise we have no objection.

The Court: It will be admitted in evidence if
that can be removed some way.

Mr. Gillen: There is a fixed amount there and

(Testimony of Frank A. Bray.)

I think it can just be deducted from the 1946 charges.

The Court: Very well.

Q. Referring to Exhibit 101, will you state the purchases that were made on that account which were paid for during the years 1944, 1945, and 1946, and the amounts of the payments?

Mr. Gillen: Now just a moment. First of all, may it please the Court, I think it will be found that they were not all purchases. Some are repairs and replacements of things. They wouldn't all be purchases and you couldn't contemplate all the charges of 1946, because of the very matter I mentioned a moment ago.

The Court: Can you reframe your question to meet the situation?

Mr. Thompson: I believe if the question is read again, it does eliminate—I said purchases made during those years which were paid for during those years.

Mr. Gillen: They are not all purchases. It still doesn't [711] meet the objection.

Mr. Thompson: I don't care what you call them. The charges to the account.

Mr. Gillen: That is better.

A. Do you want in dollars and cents or individual items?

Q. Individual items.

A. On March, 1944, diamond ring, \$106.87. On the same day there was another diamond ring, \$168.75. Under March 31, 1944, there was repairs,

(Testimony of Frank A. Bray.)

total \$129.37. That was for altering a ring and also altering a bracelet. In May of 1944, there was a charge for mounting a diamond in amount of \$25. On June 7, 1944, there was another ring purchase, \$122.50. That is described as pladium ring, so I don't quite know whether that is correct terminology for whatever that purchase was. On June 30, 1944, purchase of pladium ring for \$73.50. On February 5, 1945, there was a ring made as ordered, which totaled \$300. February 16th was a repair, a diamond and emerald bracelet in amount of \$5.50. July 26, 1946, there was repairing diamond and emerald bracelet and replace stones for \$96.75. December 9, 1946, purchase of gold charm for \$12.25.

Mr. Gillen: I think some of those items, if the Court please, were not paid for until 1947, and therefore, should be eliminated. I move that they be stricken. Counsel can very easily see what the charges were for 1946, and deduct from that the payment made in 1947, to eliminate those [712] charges.

The Court: Meet that suggestion, Mr. Thompson, if you can.

Mr. Thompson: The last item should be stricken, \$12.25.

The Court: That item will be stricken. What item is that?

Mr. Thompson: Gold charm, \$12.25.

The Court: That will be stricken. That seems to be the only one that you found there of that nature?

(Testimony of Frank A. Bray.)

Mr. Thompson: That is correct. Would you like to examine the exhibit?

Mr. Gillen: No, if you say that is the only one, that is good enough.

Q. Now, Mr. Bray, will you state when, during the years 1944, 1945, and 1946, those payments were made on that account and in what amount?

A. In the year of 1944, on April 6th, we received \$404.99. On June 21st, \$25; October 17th, \$196. In the year of 1945, on May 5th, we received \$305.50. In the year of 1946, on November 6th, \$96.75. That is the extent of the payments.

Q. Now do your records show whether those were payments on account either by cash or check or were they credits for returned merchandise?

A. They were not credits for returned merchandise because they are not indicated as such, but it does not show from the application of credit for payment of money, could be either check or [713] actual cash.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Were any of those payments that were charged there on that account paid by other than the holder of the account, to wit, Mr. or Mrs. Remmer?

A. That would not be definitely determined by the company account. It could be paid by either one

(Testimony of Frank A. Bray.)

of the members or by somebody else, as far as that goes.

Q. It is true, is it not, that that account reflects that some of those payments were paid by an insurance company for Mr. Remmer, isn't that true?

A. There are certain pencilled notations on here. The actual payment, so far as being identified as being paid by one or the other, could only be determined by association of the amount of the charge and the amount of payment. When I say associating the two, I mean where there is a notation that the insurance company might have been involved.

Q. Also on there are charges such as repair or replacing of stones, is that correct?

A. That is right.

Q. Now there is a notation on there in one or two instances that particular charges should be sent directly to the Bridgeman Insurance agent, isn't that so?

A. Yes, there are two notations there. [714]

Q. Will you tell us what notations they were for, what amounts and what items?

A. Well, you can't identify them as to particular items, unless you want to assume that a repair job was to the insurance company.

Q. Just tell us what the pencilled notations state with reference to sending these bills to someone other than Mr. Remmer.

A. Well, it is noted here, "Send bill to C. A. * * *," and I can't make the name out, 333 Montgomery Street.

(Testimony of Frank A. Bray.)

Q. Is it Bridgeman?

A. Well, something like that.

Q. Was it Bridgeford, C. H., 333 Montgomery Street? A. Yes, it could be that.

Q. What was that item, please?

A. Well, that notation is opposite this pladium ring valued at \$122.50.

Q. That could have been replacement of a lost article, is that correct? A. It is possible.

Q. Now is there any other item that has notation that bill should be sent to the insurance broker or company or to a name other than the Remmer name, other than the account name?

A. Well, there is an item here, there is a notation pencilled, one diamond to match stone, diamond and star sapphire ring, \$232.75. [715]

Q. That was what date?

A. December 9, 1946.

Mr. Gillen: That is an item that should have been eliminated, then.

Q. Is there any item earlier than that, earlier months or years?

A. No, not with any notation on it.

Q. Now, Mr. Bray, there are other items in addition to the item that has notation to send bill to the insurance agent, Bridgeport, 333 Montgomery Street, there are other items there which show jobs of repair, isn't that so? A. That is true.

Q. More than one?

A. Yes, there is more than one.

Q. How many are there, can you tell us? Not

(Testimony of Frank A. Bray.)
counting the one in December of 1946, which we
have agreed has no place in the record.

A. There are about three items.

Q. Three items of repairs and replacements?

A. Yes.

Mr. Gillen: I think that is all, thank you.

Redirect Examination

By Mr. Thompson:

Q. Mr. Bray, do Shreve & Company send statements showing the cost of articles to insurance companies for any reason other than to obtain payment from the insurance company? [716]

A. Yes, sometimes by reason of the fact that people have insurance policy, they sometimes request a bill for that purpose, to have the value to know if they are entitled to the insurance.

Q. Mr. Gillen called your attention to an item under date of June 7, 1944, pladium ring, in a total charge of \$122.50, and with the pencilled notation alongside it, "Insurance bill to C. A. Bridgeport, 333 Montgomery." Did you find a credit in the account in the amount of \$122.50?

A. That specific amount is not reflected as an individual item.

Q. You did not receive one payment from any one in the amount of \$122.50?

A. That is correct.

Mr. Thompson: That is all.

(Testimony of Frank A. Bray.)

Recross-Examination

By Mr. Gillen:

Q. Of course, it is within your knowledge, is it not, Mr. Bray, when a person loses a ring, an insurance company might either pay your company direct or might pay the insured a check, is that correct? A. That is true.

Mr. Gillen: That's all.

(Witness excused.)

(Jury admonished, and alternate jurors, and excused at 3:55 p.m.) [717]

Mr. Campbell: May I suggest there is a matter that we would like to take up out of the presence of the jury that will take two or three minutes.

The Court: Very well, we will be in session for a few minutes.

(In the absence of the jury.)

Mr. Pike: Your Honor, I wish to address the Court on any necessary clarification of the Court's decision or ruling on the right of government's counsel to inspect the records that are presently deposited with the clerk.

The Court: The government's counsel may inspect the records now in the custody of the clerk.

Mr. Pike: I understand, of course, that they are likewise accessible for inspection by defense counsel at any time that can be arranged with the clerk.

The Court: That is so understood.

Mr. Golden: Under the rule, your Honor, as I understand it, it is not necessary to take an exception unless the situation is such where it might be said the Court has not been advised of the action which is taken. We except to your Honor's ruling upon all the grounds heretofore urged, including not only legal grounds, which I will not attempt to repeat at length unless your Honor wishes me to, but also the practical grounds. It hampers our defense, for the reasons pointed out this morning and thus makes it practically impossible, if not impossible, [718] for us to look at these records.

The Court: That is what we have to contend with. We all have to travel back and forth and I can't see how we can avoid it, unless you can prevail upon Congress to build us a decent courtroom in Reno. I would be glad to have you use your influence to that end.

We will be in recess until tomorrow morning at 10:00 o'clock.

(Recess taken at 4:00 p.m.) [719]

December 13, 1951—10:00 A.M.

(Defendant present with counsel.)

(Argument on motion to strike certain testimony.)

1025 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

LESTER SIMMONS

a witness on behalf of the plaintiff, having been previously sworn, testified as follows on continued

Direct Examination

By Mr. Campbell:

Q. Mr. Simmons, you identified yourself on the stand the other day as being the brother of George Simmons; is that correct? A. Yes.

Q. And you further identified yourself as being the present bookkeeper of Mr. Pechart and Mr. Kessel? A. Yes, sir.

Q. Who were on the stand yesterday and the day before? A. That's right.

Q. And while on the stand you were asked concerning the records of the 21 Club, the San Diego Social Club and the 311 Club, which you have been subpoenaed to produce, and stated, I believe, that they had been delivered to Mr. Remmer on instructions of your employers; that a receipt had been obtained for such records and that the receipt was in the possession of Mr. Remmer; is that [720] correct? A. That is correct.

Q. I show you government's Exhibit 96, which purports to be a receipt from Mr. Remmer for certain records of those three organizations, together

(Testimony of Lester Simmons.)

with personal tax returns of Joseph Billington, and ask you if that is the receipt to which you refer?

A. It is.

Q. Now was this document written by you?

A. Yes, it was.

Q. Did you personally type it or did you dictate it to a stenographer? A. I typed it.

Q. And at the time you typed it, did you examine each of the records which were turned over to Mr. Remmer, for the purpose of determining whether or not this receipt accurately stated what documents and records were being turned over to Mr. Remmer? A. I did.

Q. Now I call your attention on this document to language appearing immediately above the signature: "Tax returns 21 Club 1943 were not returned with records when picked up from Mr. John Golden." I will ask you whether or not the records referred to in this receipt had previously been delivered and then received from Mr. John Golden?

Mr. Gillen: My objection is that yesterday there was a stipulation offered by the defense, and accepted by the [721] prosecution, regarding certain of these particular records, namely, that they had been put in the hands of an attorney by the name of Kessler of Oakland, California, who is a relative of Mr. Kessel's, who also served as attorney for Pechart and Kessel, and that he had some of those records and turned over certain of them to Mr. Golden for a time and that they were returned.

(Testimony of Lester Simmons.)

This is simply attempting to accentuate and it is repetitious, has been asked and answered.

Mr. Campbell: I might state, your Honor, I have in mind the examination by Mr. Gillen of Mr. Pechart, where he developed the point and emphasized the point that the records referred to were, after the government's agent's examination, at all times and up until the time they were turned over to Mr. Remmer, in the possession of Mr. Pechart or his accountant.

Mr. Gillen: We have the stipulation, we will show it to you in the record, just a moment, and it was accepted—page 676, yesterday's record.

The Court: It might save a little time if I could have a look at the transcript. (Court examines transcript.) Objection overruled. He may answer the question.

Mr. Gillen: Well, may the record show that it is in the record and your Honor saw it?

The Court: I don't think that is necessary.

Mr. Gillen: Let the record show that we showed your [722] Honor and Mr. Campbell where the stipulation was entered into.

The Court: Let us proceed. Read the question.

(Question read.)

Mr. Gillen: Objected to—it is already in the record by stipulation and accepted by the prosecution.

The Court: The objection has been overruled, and let us just have the question read to the witness so he may understand it.

(Testimony of Lester Simmons.)

(Question read.)

Mr. Gillen: Now I am going to ask the Court's permission to examine Mr. Simmons on voir dire in regard to any knowledge on the subject.

The Court: Motion denied. Answer the question.

A. The records were at some time previously delivered to an agent of Mr. Remmer's, whom I do not know. They were later returned to the office of Pechart and Kessel by Mr. Golden.

Q. By Mr. Golden, did you say?

A. That's right.

Q. Do you recall what date it was upon which Mr. Golden returned those records?

A. No, I do not.

Q. Calling your attention to the date of that particular document, which is, I believe, April 24, 1951, can you state when it was with relation to the writing of that document that the records were returned by Mr. Golden? [723]

Mr. Gillen: Objected to, may it please the Court, as having been asked and answered. The witness says he doesn't know.

Mr. Campbell: I want to ascertain if this will refresh his recollection.

The Court: Objection overruled. Answer the question.

A. This does not refresh the matter.

Q. Now, Mr. Simmons, when did you first begin employment, so far as the keeping of books and

(Testimony of Lester Simmons.)

records, in behalf of Mr. Pechart and Mr. Kessel?

A. Approximately around the first part of January of '45.

Q. And was your employment at that time directly by Pechart and Kessel, or was it from your brother? A. It was from my brother.

Q. And how long did that arrangement continue, so far as your keeping books and records in behalf of Mr. Pechart and Mr. Kessel, under the direction of your brother?

A. Until about September of '48 or September of '49.

Q. Now directing your attention again to this receipt, let me ask you this—are the records set forth hereon all of the records that were maintained, so far as you knew, with respect to the operations of the 21 Club, the San Diego Social Club, and the 311 Club, for the years 1943 to 1946?

A. To the best of my knowledge that is the records in its entirety.

Q. Now I call your attention to the fact that under the heading [724] "21 Club," there is listed a general ledger. I will ask you whether or not a general ledger was also maintained for the San Diego Social Club and for the 311 Club?

A. I was not familiar with those two activities, but I don't think there was a general ledger.

Q. Were you familiar with the record keeping so far as the 21 Club was concerned?

A. Yes, I was.

Q. Now will you state just what records were

(Testimony of Lester Simmons.)

kept for that club, particularly for the years 1943 to 1946?

Mr. Gillen: Objected to, may it please the Court, as having been asked and answered. The exhibit is the best evidence and this witness said that so far as his knowledge was concerned, that they represented all the records pertaining to those activities.

Mr. Campbell: I will withdraw the question.

Q. You referred here to a cash journal for the 21 Club. Will you state the general nature of that record?

A. The cash record is the record that shows the cash receipts and disbursements, daily journal, usually.

Q. Is that what it was in respect to that operation? A. Yes, it was.

Q. Showed the cash receipts and cash disbursements; is that correct? A. Yes, sir. [725]

Q. And you refer there to a general ledger. Will you tell the nature of that book of account, so far as the 21 Club was concerned?

A. This general ledger is double entry usual type ledger.

Q. Now was that general ledger, to your knowledge, brought up to date, so far as the operations of the 21 Club for the years 1943 to 1946 were concerned?

A. The general ledger, so far as I know, was up to date by the end of 1946.

Q. And was up to date at that time?

A. Yes, sir.

(Testimony of Lester Simmons.)

Q. Now will you state whether or not in that general ledger there were set forth investment accounts or capital accounts, or whatever designation they may have had, accounts showing the contributions and accumulated profits of the partners thereto? A. I got lost on your question.

(Question read.)

A. I don't recall what was in the books on the investment accounts.

Q. Do you recall whether or not there were investment accounts? A. No, I do not.

Q. Do you recall whether or not the general ledger set forth accounts payable of the 21 Club?

A. Yes, sir.

Q. Do you recall whether or not there were drawing accounts of [726] the partners.

A. I do not think there were.

Q. Do you recall whether or not the general ledger set forth the notes payable of the 21 Club?

A. Yes.

Q. Now would those matters to which I have referred, that is to say investment or capital accounts, accounts payable and notes payable, be also set forth in the cash receipts and disbursements journal?

A. Yes, they would.

Q. And were they in the case of the 21 Club?

A. To the best of my knowledge now they were.

Q. And in what form did they appear in the cash receipts and disbursements journal?

A. I do not know.

(Testimony of Lester Simmons.)

Q. Do you have any recollection of the contents of those books, so far as accounts payable and notes payable at the end of each of the calendar years, 1943 to 1946? A. No.

Q. Do you have any recollection of what those books would show by way of investment or contribution by the partners?

A. Not at that time.

Q. Would your answers be the same as to the San Diego Social Club?

A. I don't know anything about the San Diego Social Club. [727]

Q. Do you know anything about the 311 Club?

A. I know about the 311 Club. I know nothing about the records that were maintained.

Q. Did you, yourself, keep the records or make the entries of the 311 Club with respect to any of the years 1944 to 1946, inclusive?

A. The only times I would have had any occasion to be concerned with either of those two enterprises would be to possibly make up pay rolls in the absence of George.

Q. In the absence of your brother; is that correct? A. Yes.

Q. Now during the years—that is, from the time you commenced your employment with respect to these enterprises, I think you stated in 1945, and up until the end of 1946, were you the authorized signator on any bank accounts maintained by the 21 Club, the San Diego Social Club and the 311 Club?

(Testimony of Lester Simmons.)

A. I was authorized to sign checks on the 21 Club with a co-signature of Mr. Billington.

Q. And where was that bank account maintained? A. Mechanics Bank at El Cerrito.

Q. What, if any, designation was on that account? What was the name of the account?

A. 21 Club.

Q. Was there any other designation on that account?

A. I don't understand the question. [728]

Mr. Campbell: Well, I will reframe the question.

Q. Was that an account used for any particular purpose?

A. It was used for the purpose of paying the disbursements on the 21 Club.

Q. Was that the only account maintained in the name of the 21 Club at the Mechanics National Bank?

A. It is the Mechanics Bank. There were two accounts; one was general operating account, one was the pay roll account.

Q. And which of the two accounts was it that your signature was authorized? A. Both.

Q. You were authorized on both?

A. That's right.

Q. And was Mr. Billington's signature also authorized on both? A. Yes, he was.

Q. Were you authorized to sign any checks with respect to any bank account of the San Diego Social Club?

(Testimony of Lester Simmons.)

A. It is possible I was on the account to sign pay roll checks.

Q. Was there more than one account for the San Diego Social Club, if you know?

A. I don't know.

Q. Do you recall the name of the account of the San Diego Social Club?

A. It went under the name of the San Diego Social Club.

Q. Was there any designation on that [729] account? A. None other than that name.

Q. Now with respect to the 21 Club, did you, yourself, handle the deposits of money to that account? A. Yes, I did.

Q. How often was that done?

A. Generally weekly.

Q. And we are referring specifically to the period from when you commenced your employment up to and including December 31, 1946. Now during that period of time from whom did you receive the money with respect to the 21 Club to deposit in the bank? A. Mr. Billington.

Q. And where would you receive it?

A. At the club.

Q. You would visit the club; is that correct?

A. Yes, sir.

Q. Mr. Simmons, who made out the deposit tickets on the deposit of money? A. I did.

Q. I presume the money would be in the form of checks, currency and silver; is that correct?

A. That's right.

(Testimony of Lester Simmons.)

Q. And at the time you received the money, did you receive any memoranda or account of any kind with respect to that money?

A. Yes, there would be the sales recap of the sales for the week. [730]

Q. And in what form did you receive that recap of sales? A. I don't remember.

Q. Well, do you recall whether it would be a sheet of paper, an adding machine paper or cash disbursed tab?

A. I believe that Mr. Billington prepared a weekly sheet, on which the daily sales totals were noted.

Q. How were those sales broken down?

A. Between the food sales and bar sales.

Q. And was there or was there not included on that sheet the sales, as you refer to, or receipts—they are one and the same thing, are they not? Is that correct? A. Yes.

Q. (Continuing): —with respect to the operation of the back room known as the San Diego Social Club? A. They had no connection.

Q. So that the money which Mr. Billington handed to you and the weekly recapitulation of the sales referred only to the bar and the restaurant; is that correct? A. That's right.

Q. And was there also set forth upon that recapitulation such expenses as had been paid out in cash during the week?

A. They were covered by actual paid cash invoices he had in his possession.

(Testimony of Lester Simmons.)

Q. In other words, when the baker would deliver some bread to the restaurant and would receive cash, his paid invoice would [731] show up with the cash; is that correct? A. That is right.

Q. After you received that recapitulation, what did you do with it?

A. It was put in the files of the 21 Club. That was the basis for posting the cash journal.

Q. Both as to receipts and expenditures?

A. Yes, sir.

Q. And after the posting had been done, what was done with those records? What was done with the weekly recapitulation which Mr. Billington gave you, and the paid invoices?

A. The paid invoices were filed usually according to the source of supply and the bill sheets were filed also.

Q. And where are those records?

A. At this time I do not know.

Q. Did you have any means of checking those weekly recapitulation sheets and the amount of cash and paid bills which were handed to you, for the purpose of determining whether or not you were receiving weekly all of the receipts of the 21 Club for deposit or posting?

A. No, I did not check.

Q. I take it then you accepted them for your purposes as being accurate; is that correct?

A. Yes, sir.

Q. And they formed the basis of the records

(Testimony of Lester Simmons.)

which you kept as [732] to the profits or losses of the 21 Club? A. Yes, sir.

Q. Now did you have anything to do with the deposit of funds in the bank of the San Diego Social Club?

Mr. Gillen: Objected to as asked and answered several times. He said he had nothing to do with it.

Mr. Campbell: He says that he drew checks on the San Diego Social Club.

Mr. Gillen: He said he might have on the bank account for the pay roll at one time.

The Court: You may answer the question.

A. I may have physically carried the money to the bank from the office of my brother, George Simmons.

Q. Was money delivered from the San Diego Social Club to your office?

A. That I do not know.

Q. Did you make out deposit slips in relation to the San Diego Social Club?

A. Not that I recall.

Q. Other than what you have described as possibly signing pay roll checks, did you have anything whatsoever to do with the San Diego Social Club?

A. No, I did not.

Mr. Campbell: You may cross-examine. [733]

Cross-Examination

By Mr. Gillen:

Q. Mr. Simmons, referring to the prosecution's Exhibit 96, which is a receipt—it is really a state-

(Testimony of Lester Simmons.)

ment by Mr. Peehart as to what he was turning over to Mr. Remmer and a receipt by Mr. Remmer what he received in the way of books of account on April 24, 1951—referring to that exhibit and referring particularly to the language at the bottom: "Tax returns for 21 Club for 1943 were not returned with records when picked up by Mr. John Golden," it is a fact, is it not, that the 1943 tax return which is mentioned in that language, that was merely an office copy of the 1943 return that was made to the government, the original of which was made to the government; isn't that true?

A. I don't know.

Q. Well, was there a return made for the 21 Club, an income tax return, made for the 21 Club in 1943? A. I have no knowledge.

Q. You weren't there at that time?

A. No.

Q. We will get to that another way. It would be earlier than your employment?

A. That is right.

Q. You were there, however, when all of the records of the 21 Club, the San Diego Social Club, and the 311 Club were turned over to agents Gould and Farley, for the purpose of making an audit for a period of three years; is that correct? [734]

A. Yes, sir.

Q. And were most of those records in your possession and under your supervision at the time Messrs. Gould and Farley arranged to look at them?

A. They were in the office of my brother.

(Testimony of Lester Simmons.)

Q. And did you participate in facilitating their work for them, that is, turning over the records to them and providing whatever they needed?

A. Yes, sir.

Q. And do you have any distinct recollection yourself how long those records were in the hands of Messrs. Gould and Farley?

A. To the best of my recollection, it was about three or four months.

Q. Do you have any distinct recollection of where they worked?

A. Yes, they worked in the office of the El Rancho San Pablo.

Q. And that was across the street from your own office? A. Yes, it was.

Q. And that office was provided for their convenience by Mr. Pechart, is that correct?

A. That's right.

Q. Were you personally present when Messrs. Gould and Farley returned on several separate days the books that had been turned over to them?

A. Well, physically the books were left in the office which they were using. [735]

Q. Over at the Rancho San Pablo office?

A. That is right.

Q. Was it brought to your attention by those gentlemen that they were through with those records?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer the question.

A. I don't know. There was no direct statement

(Testimony of Lester Simmons.)

made to me that they were through with them. Just assumption on my part they were through; they left them there and were gone.

Q. They also made audit reports to you, did they not, and gave you copies of their audit reports on various dates?

A. The reports were not made to me personally.

Q. They were mailed to your office, were they not?

A. I think they were mailed to Pechart and Kessel.

Q. Do you have a recollection that agents Farley and Gould sent their audit reports, showing that the 21 Club and San Diego Social Club, for the year 1943, that audit had been completed and the report written on October 21, 1947, and for the year 1944, for the same clubs, the audit had been completed and the report written on April 5, 1948, and for the same clubs for the year 1945 that the audit had been completed and the reports written by the aforementioned agents on July 27, 1948, and that with reference to the 311 Club for the year 1944, the audit had been completed and the report written on April 5, 1948, and for the year 1945 for the same club the audit had been completed [736] and the report written January 27, 1948. Do you have any recollection of those reports coming into your possession from the government, at or about those times?

Mr. Campbell: Objected to, not the best evi-

(Testimony of Lester Simmons.)

dence. It is a compound question, which is also unintelligible.

The Court: I think it covers several points.
Objection sustained.

Mr. Gillen: It is not the best evidence, I agree; then let the government produce the reports.

The Court: That is not the basis of the ruling. The basis of the ruling was it was a compound question.

Q. All right. Do you have in mind now what was contained in the audit reports which you say were mailed to the office of Pechart and Kessel after the revenue agents had left the books and left the place of the Rancho San Pablo, after their three or four months' work?

Mr. Campbell: Objected to as not the best evidence, if the Court please. The evidence here shows that there is in the possession of counsel the matters which he is directing attention to.

The Court: Objection overruled. Answer the question.

A. I do not know the contents of the revenue agents' reports.

Q. Now with regard to the 21 Club, concerning which you testified, do you recall, that Mr. Campbell asked you whether or not the books that were kept showed any capital investment? [737]

A. Yes, sir.

Q. What is your recollection in that regard? Did the books you kept on the 21 Club show any capital investment?

(Testimony of Lester Simmons.)

Mr. Campbell: Objected to on the grounds the books themselves are the best evidence.

The Court: That is generally a good objection. I am inclined to sustain that objection ordinarily.

Mr. Gillen: I am asking him about something on direct.

The Court: But that is the idea. We had these matters gone into on direct examination.

Mr. Campbell: May I be heard on this objection, your Honor? I notice it is time for the morning recess.

(Jury and alternate jurors admonished and excused for 15 minutes. Recess taken for 5 minutes at 11:07 a.m.)

11:15 A.M.

(Defendant present with counsel.)

(In the absence of the jury.)

The Court: I have a thought I would like to state. The objection would ordinarily be good, but you propounded on direct examination many questions to which the same objection would have been sustained. Now you might say counsel did not make the objection, therefore it was all right to continue to pursue that course of examination, but in asking those questions [738] you evidently expected an answer and you got those answers and I do not think it would be proper to sustain the objection now to some question on cross-examination directed to matters which were referred to on direct examination.

Mr. Campbell: May I give your Honor the thought I have in mind. I do not believe your Honor would have sustained such an examination on direct examination, because inasmuch as we had shown that the best evidence, that is the books and records of the 21 Club, the San Diego Social Club and the 311 Club, were out of the reach of the government, having been put in the hands of the defendant himself, and the evidence having shown that they were still in the hands of the defendant, then we are entitled to secondary evidence as to his recollection, if he had a recollection, of what was in those books and the source of the information that went in there. We had laid the foundation for that secondary evidence and his testimony was in the manner of secondary evidence, but here we are faced with a different situation on examination by defendant's counsel, inasmuch as the record shows that it is within their power to produce—

The Court (Intervening): Aren't these records all in the clerk's office now?

Mr. Campbell: No, your Honor, these records are not included among those. These records never came within the [739] possession of the government other than, you might say, constructively, as testified to by the witness, when room was provided for them and they worked on them and left them there and subsequently they were turned over to the defendant

The Court: Those records are not now in the possession of the government or the clerk of this court?

Mr. Campbell: No, your Honor; so we are faced with a different situation. That is why we laid the secondary evidence foundation as to the present custody of those books and records and that was the basis now of my objection.

The Court: Objection overruled.

Mr. Campbell: May I be heard? I would like to show your Honor the absolute fallacy for that objection. We have testimony here introduced, not by the defense, but by the prosecution, that two government agents had all of those records made available to them by Pechart and Kessel for a period of some four months, that facilities were provided for their convenience, that they worked on them for a period of four months, that they got through with the records, that they abandoned and left them, that they made an audit and made a report on their audit. Now certainly the original audit and the original report on the audit was made to the government and the only thing that would be in these records would be a copy of the report on the audit, which would be secondary evidence and the original and primary evidence would be in the hands of the government right [740] now. Now when they worked on these books and records, may it please the Court, for a period of four months, it is not inconceivable and it is not stretching the imagination of the Court or any one else to believe that they must have photostated, examined and exhaustively scrutinized and took copies of everything that they needed to make a complete audit report to their superiors.

So that all of the primary evidence is in the hands of the government right now.

The Court: Let me ask Mr. Gillen a question. That question that you propounded here, to which objection has been made—read the question.

(Question read.)

The Court: Now I want to ask a question. The subject matter of the question would be included in this audit report?

Mr. Gillen: Absolutely.

Mr. Campbell: May I suggest this, your Honor, I can not follow counsel and I can not believe he is seriously contending—

Mr. Gillen: I am serious, I assure you of that.

Mr. Campbell: May I finish—I can not believe he is seriously contending that a transcript or a report made from books and records becomes primary evidence. The primary evidence is the books and records of original entry, and transcripts of the report, oral or written, are certainly not the best evidence, and certainly if we were to offer such reports here, he would be [741] the first to object that they were not the best evidence, that the books and records themselves were the best evidence.

The Court: Another point would have been to say this is not proper cross-examination, but you went into these matters on direct examination and I have always thought that under cross-examination the ground covered by direct could be gone into. I am going to overrule the objection. The objection is overruled. Bring in the jury.

11:23 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SIMMONS

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

(Last question read.)

Mr. Gillen: The Court says you may answer the question.

A. I do not remember about capital investment.

Q. Is it not a fact, Mr. Simmons, that you recall that the only investment of Mr. Remmer in connection with the 21 Club and the San Diego Social Club was that he made available the land and the building on the land in which those two enterprises were housed?

Mr. Campbell: If he knows.

Mr. Gillen: No, this is cross-examination. I wonder if I may stumble through in my own way? I am not bound by the [742] rules as on direct examination.

The Court: All right.

Q. Do you have the question in mind?

(Question read.)

Mr. Campbell: Objected to, assumes a fact not in evidence, the witness having stated he knew nothing about the San Diego Social Club.

(Testimony of Lester Simmons.)

The Court: He may answer the question.

A. I do not believe there are any entries on the books reflecting such a condition.

Q. Isn't it a fact, and within your knowledge, that Mr. Remmer made no cash investment in either the 21 Club or the San Diego Social Club and his only investment, if it might be called such, was the availability of the building and the land on which it stood?

A. I do not recall anything in the books indicating that he made an investment.

Q. Any cash investment? A. No.

Q. You recall, do you not, that the entire cash investment was made by Messrs. Pechart and Kessel and that the arrangement was that their initial investment was to be returned to them before any profits derived from the enterprises were divided?

A. I do not know what the initial arrangements were.

Q. They were made before your [743] participation? A. Yes, they were.

Q. Now you testified that on weekly occasions you would go to the 21 Club and obtain information concerning the receipts and disbursements for the food, the restaurant, and the bar, is that correct?

A. Yes, sir.

Q. And that you would post that data in the books and any money that was on hand you would take it to the bank? A. Yes, sir.

Q. And any checks which were to be paid either

(Testimony of Lester Simmons.)

you or Mr. Billington or both of you, as required, signed the checks?

A. Yes, sir, required two signatures.

Q. And that that pertained only to the 21 Club?

A. Yes, sir.

Q. And you stated that you did not check the data that was given to you by Mr. Billington, is that correct? A. Yes, sir.

Q. It is true, is it not, that you were given cash register tickets as well as any statement concerning receipts and disbursements?

A. Those were retained in the office of the 21 Club.

Q. It is true they were made available to you, the cash register tickets, isn't that so?

A. They could have been if I wanted them.

Q. And the cash register tickets would have shown, of course, [744] all the sales that were rung up and any non-sales that were rung up, isn't that true? A. Yes, sir.

Q. You were also provided with bills that came in, such as for bread and commodities, isn't that true? A. Yes, sir, the petty cash accounts.

Q. Well, isn't it a fact that some of those commodities were taken care of by petty cash fund and others were paid by check?

A. Yes, they were.

Q. And whatever those bills were, they were made available for your examination, isn't that so?

A. Oh, yes.

Q. On the occasions of the weekly visits by you

(Testimony of Lester Simmons.)

to the 21 Club to obtain this information to bring your books up to date and to deposit checks or cash receipts in the Mechanics Bank or to draw checks to cover obligations, was Mr. Remmer ever present on any of those occasions, to the best of your recollection? A. At the time?

Q. When you used to go there to get the information from Mr. Billington?

A. I think I saw him there once or twice.

Q. Can you fix the time? A. No, sir.

Q. Now as I understood your testimony, you had nothing, during that period of time, to do with the San Diego Social Club, except [745] you believe for a time your name may be on the bank account pay roll? A. Yes, sir.

Q. And if you had anything to do with depositing money, it was simply an accommodation to your brother? A. Yes.

Q. You may have been going to the bank at the time and he had a deposit for the San Diego Social Club and you took it along to accommodate him, is that correct? A. That is right.

Q. Mr. Simmons, did you participate in the preparation of any of the tax returns from the 21 Club? A. I may have typed the returns.

Q. Do you mean that you may have acted as in a mere clerical capacity? A. Yes, sir.

Q. Now for a time you were keeping the books?

A. Yes, but I didn't prepare any returns.

Q. Did you furnish the data for the returns from the books that you had kept?

(Testimony of Lester Simmons.)

A. Yes, sir.

Q. To the best of your knowledge and belief was that data that you prepared and furnished for the return to be made from true and correct?

A. Yes, it was. [746]

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

I am going to ask to have marked for identification, as government's next in order, what purports to be a revenue agent's report year 1943 of the 21 Club and San Diego Social Club.

The Clerk: 102 for identification.

Mr. Campbell: And have marked 103 for identification what purports to be revenue agent's report of the 21 Club for the year 1944; as exhibit 104 for identification what purports to be the revenue agent's report of the 21 Club and San Diego Social Club for the calendar year 1945; government's 105 for identification what purports to be revenue agent's report for the 21 Club and San Diego Club for the calendar year 1946.

Mr. Avakian: May I inquire, for convenience in examining them, whether these are copies of reports that we requested the government to furnish the other day during the examination of Mr. Billington?

Mr. Campbell: I do not recall what counsel asked that we produce. The documents speak for them-

selves and I will ask the witness to identify them in a moment.

(Jury and alternate jurors admonished and recess taken at 11:37 a.m.) [747]

December 13, 1951—1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SIMMONS

resumes the stand on

Redirect Examination

By Mr. Campbell:

The Court: We are on redirect examination?

Mr. Gillen: Yes, your Honor, and we have examined some revenue office audit reports and with regard to those, we are prepared to stipulate that they may be offered in evidence if counsel wishes, as true copies of the original reports that probably are in the hands of the department.

The Court: Will you accept the stipulation?

Mr. Campbell: Yes.

The Court: They will be admitted as, in accordance with the stipulation, as 102—

Mr. Gillen (Interrupting): Your Honor, I should have mentioned a condition to the stipulation. Our stipulation is offered only in the event that the agent who prepared those is produced as a witness, because undoubtedly Mr. Simmons would

(Testimony of Lester Simmons.)

not be able to answer any questions concerning their handiwork.

Mr. Campbell: We will not accept the stipulation.

Mr. Gillen: Very well, we withdraw the stipulation.

Q. Mr. Simmons, counsel asked you on cross-examination as to the length of time that revenue agents Farley and Gould spent in the examination of the various books and records there at Rancho San [748] Pablo, do you recall that?

A. Yes, sir.

Q. How long did you state that that examination took place?

A. Approximately three to four months, to the best of my knowledge.

Q. Was that examination confined to the books and records of the San Diego Social Club and the 21 Club?

Mr. Gillen: Objected to as calling for opinion and conclusion and speculation of this witness, unless the foundation is established to show that he was over there and participated in their work.

Mr. Campbell: I will reframe the question.

Q. Were you the person who supplied them with books and records which they were examining on?

A. Partially.

Q. And of what enterprises or businesses did you supply the books or records during that time?

A. All the enterprises of Pechart and Kessel partnership.

(Testimony of Lester Simmons.)

Q. Will you relate what those were?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: Any answer would be confined to any one of the organizations or institutions in which the defendant has been identified.

Mr. Gillen: Now in my examination yesterday counsel objected [749] to that as immaterial and your Honor ruled with him and I think it would be just as immaterial today.

The Court: I thought matters that had to do with Mr. Pechart solely, I can't see where they had any connection here, so we would have no interest in them

Mr. Campbell: I think we have a different situation today.

The Court: Very well, if the witness will understand that we are not asking for any businesses or testimony concerning any matters not connected with the defendant.

Mr. Campbell: My point is, your Honor, there may be—

Mr. Gillen: I think the Court has ruled.

(Question read.)

Q. What enterprises, the books and records of which you made available to Mr. Gould and Mr. Farley on that occasion?

A. I don't know if I can give them all to you or not. I will try—Rancho Trailer Court—I can't recall the names of them.

Q. Was there the Wagon Wheel?

(Testimony of Lester Simmons.)

- A. The Wagon Wheel.
- Q. Was there a Johnny's Book? A. Yes.
- Q. California Novelty Company?
- A. I do not recall that.
- Q. Consolidated enterprises? [750]
- A. Yes, sir.
- Q. The Smoke Shop at 2703 San Pablo Avenue?
- A. I am not familiar with it.
- Q. Sunnyside Club? A. Yes, sir.
- Q. The B Club No. 1?
- A. That may have been in there.
- Q. The Wander Inn? A. Yes, sir.
- Q. The Riverside Club?
- A. I do not know that one.
- Q. In Pittsburg, California? A. No.
- Q. Bozo's? A. Yes, sir.
- Q. Buddy's Liquor Store?
- A. It may be, I don't know.
- Q. Were those which you recall among the books and records which you made available to Mr. Gould and Mr. Farley on that occasion?
- A. Yes, they were.
- Q. And of the books and records that were made available to them, in volume, what part of that volume consisted of the books and records of the 21 Club, the San Diego Social Club, and the 311 Club? [751]

Mr. Gillen: I think that is calling for too gross speculation on the part of this witness, and I think also it—

(Testimony of Lester Simmons.)

The Court: I think so. Objection will be sustained.

Mr. Campbell: That's all.

The Court: Any further questions?

Mr. Gillen: I have no cross-examination, your Honor, but I may suggest that the exhibits that have been marked for identification, prosecution's 102 to 105, be left in the custody and care of the clerk.

Mr. Campbell: Yes, no doubt they will be.

The Court: They are marked.

(Witness excused.)

GLENARD GOULD

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name please?

A. Glenard Gould.

Q. What is your business?

A. Internal revenue agent.

Q. How long have you been an internal revenue agent? A. Since 1943.

Q. What was your general experience prior to becoming an internal revenue agent?

A. Auditor.

Q. Now in connection with your duties as an internal revenue [752] agent, did you have occasion

(Testimony of Glenard Gould.)

in the year 1947 to make examination into the affairs of Walter Pechart and David Kessel?

A. I did.

Q. And in connection with such examination into the affairs of Walter Pechart and David Kessel, did you have occasion to examine the books and records of a business known as the 21 Club in El Cerrito? A. I did.

Q. And by whom, if any one, were such books and records as you observed and examined made available to you? A. By Simmons Brothers.

Q. Do you recall when that examination took place?

A. It began in the latter part of 1946 and continued into the first few months of 1947, as the best of my recollection.

Q. And what time was it that you saw the books and records of the 21 Club?

A. Well, that could have happened any time during that period of time.

Q. Do you have a definite recollection?

A. I do not, sir.

Q. During the course of your examination into the affairs of Walter Pechart and David Kessel, did you examine books and records of other enterprises in which they were interested? A. Yes, sir.

Q. And were they numerous or few? [753]

A. They were numerous.

Q. Now with respect to the books of the 21 Club, where physically did you make the examination?

(Testimony of Glenard Gould.)

A. The examination was all made at the Rancho San Pablo office in El Cerrito.

Q. Whose office was that?

A. That was part of Pechart's and Kessel's.

Q. Is that property, if you know, which was owned by them?

A. No, it is rented property.

Q. And where is that property located with relation to the business office of Pechart and Kessel?

A. Well, it would be catacorner across the street some distance.

Q. And how far is it, where is it in relation to the office of George Simmons and his brother, Lester Simmons, as of that time?

A. The same distance, as the Simmons office was at that time the same as Pechart and Kessel.

Q. They were occupying offices in the same premises with the office of Pechart and Kessel?

A. Yes, sir.

Q. And was your examination of all of those records conducted there at space made available to you at the Rancho San Pablo? A. Yes, sir.

Q. Did you carry away any of the books and records with you? A. We did not, sir. [754]

Q. Now will you describe, if you will, such books and records as you saw with relation to the 21 Club?

A. The 21 Club, as I recall, had a fairly complete set of records, consisting of a general ledger, journal and cash receipts and disbursements.

Q. By a general ledger, referring to general

(Testimony of Glenard Gould.)

ledger, was that a single or double entry system?

A. It was a double entry set of books.

Q. Will you state whether or not, from your examination, if there was set up in that ledger an investment account? A. Yes, sir, there was.

Q. As a matter of fact, the double entry system requires an investment account?

A. That is correct.

Q. And during the time that you examined such records, did you make a transcript from the general ledger of the 21 Club?

A. I did, for our working papers.

Q. Do you have that transcript with you?

A. Yes, sir.

Q. Will you produce that? A. Yes, sir.

Mr. Campbell: May this be marked for identification as government's next in order.

The Clerk: 106.

Q. Mr. Gould, have you seen the books and records of the 21 [755] Club since you made this transcription? A. No, sir, I have not.

Q. I will ask you whether or not the figures appearing hereon were figures taken by you from those books and records which you examined?

A. They were.

Q. Do the figures appear in this fashion in the books, or do those represent in many instances combined figures?

A. No, as I recall, they were taken from the closing entries at the end of the year, as prepared by the accountants.

(Testimony of Glenard Gould.)

Q. As set forth in those books?

A. Yes, sir.

Mr. Campbell: This will be offered in evidence as government's Exhibit 106.

The Court: I hear no objection. It will be admitted. Exhibit 106 admitted.

Q. Now, Mr. Gould, if you will refer to your working papers, will you state the amount shown in the investment account of the 21 Club as of December 31, 1943?

A. Total amount of \$15,353.07.

Q. Will you state the amount shown as investment account as of December 31, 1944?

A. \$13,809.87.

Q. As of December 31, 1944, did the books also show any notes payable to Elmer Remmer? [756]

A. Yes, sir, item of \$6100.

Q. Did the books, in addition, show any accounts payable to Mr. Remmer as of that date?

A. Not so marked that I see.

Q. Now that note payable, is that a note payable to Mr. Remmer, or by Elmer Remmer?

A. No, it is note payable to Elmer Remmer.

Q. As of December 31, 1945, what was the amount shown in the investment account?

A. \$23,027.69.

Q. And where there also—

A. (Interrupting): I beg your pardon—which year?

Q. December 31, 1945.

(Testimony of Glenard Gould.)

A. I gave you the wrong figure, I gave you '46. The figure 1945 is \$3,435.94.

Q. And did the books as of December 31, 1945, show any account payable to Elmer Remmer?

A. Yes, an item of \$8700.

Q. And as of December 31, 1945, did the books show any accounts payable to Elmer Remmer?

A. I don't see any, no.

Q. As of December 31, 1946, what was the amount shown in the investment account?

A. \$23,027.69.

Q. As of December 31, 1946, did the books show any notes payable [757] to Elmer Remmer?

A. No, they had been closed into the investment account.

Q. As of December 31, 1946, did the books show any accounts payable to Elmer Remmer?

A. There is an item of accounts payable of \$1402.37 at the end of '46.

Q. Now did you make an analysis of the investment account as of December 31, 1946?

A. There was an analysis in the records, yes.

Q. You made a transcript of the analysis in the records? A. Yes, sir.

Q. And what did that analysis show to be credited to Elmer Remmer in the investment account of the 21 Club as of December 31, 1946?

A. \$11,513.85.

Q. And were there additional amounts as shown on the records as of that date owing to him in that analysis?

(Testimony of Glenard Gould.)

A. Only this \$1402.37. I think all of it had been closed into the investment account. I would say it might have been closed into the investment account.

Q. And had there also been closed into the investment account at that time profit and loss accruing to the credit of Elmer Remmer as of that date? A. Yes, sir.

Q. In what amount? [758]

A. The profit and loss was \$4,215.49.

Q. Was that profit or loss? A. A loss.

Q. According to those books as you then saw them, as of December 31, 1946, what was the total amount to the credit of Elmer Remmer, both of investment and accrued profits? A. \$15,729.34.

Q. Now at the time you were making the examination of various books and records relative to Walter Pechart and David Kessel, was any other revenue agent working with you in that connection?

A. Yes, Mr. Lester D. Farley.

Q. Did you make some division of the work, and if so, in what manner?

A. Well, the only division of the work was that as we came to the various enterprises, one would take one enterprise and make examination and some other agent would take some other enterprise and do likewise.

Q. And I take it then that the 21 Club was the one which fell to your lot?

A. Only as far as making transcript off the records for our work papers.

(Testimony of Glenard Gould.)

Q. Now did you examine the records, if any, of the San Diego Social Club?

A. I did not examine them. I may have seen them, but I did not examine them. [759]

Q. Now with regard to the investment account, other than at the end of 1946, when you have referred to the analysis which appeared in the record, was that the only year in which an analysis was set forth?

A. To my knowledge I can't remember, Mr. Campbell. I made it only for balance sheet purposes, inasmuch as we were closing out at the end of 1946 for a net worth statement.

Q. For your examination? A. Yes, sir.

Q. The investment figure you have given as of the end of 1943, 1944, and 1945 included the shares of all the partners, did it?

A. That is correct.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Gould, you stated you have been a revenue agent since 1943, is that correct?

A. Yes, sir.

Q. To what office have you been assigned?

A. Internal Revenue Agent in Charge, at San Francisco.

Q. And do you work out of the San Francisco office?

A. Yes, sir. However, our office is located at

(Testimony of Glenard Gould.)

709 Financial Center Building in Oakland. We have a branch office in Oakland.

Q. And you work out of the branch office in Oakland, is that correct? A. Yes, sir. [760]

Q. Can you tell us what the duties of an internal revenue agent are?

A. The duties of an internal revenue agent are to make examinations for verification of all returns filed or returns assigned to him, from the books and records of the taxpayer.

Q. I take it not all returns go to the internal revenue agent's office for examination?

A. That is correct.

Q. But when returns are assigned to you, as internal revenue agent, it is then your responsibility to make such investigation as may be necessary to verify the correctness or incorrectness of that return? A. That is correct.

Q. And there were assigned to you, I take it, for such an examination, the partnership returns of the 21 Club for the years 1943 to 1946, inclusive?

A. Not necessarily.

Q. Will you explain your answer?

A. Yes. The assignment would be made on the principal and as such it would be necessary to go into the partnerships but would not necessarily have to have the partnership assignment.

Q. When a return of an individual is assigned to you for examination and verification and you learn that that individual is a member of a partnership, is it then the custom for you to inquire into

(Testimony of Glenard Gould.)

the correctness of the partnership income as [761] reported? A. That is correct.

Q. And is that what you did in this case in respect to the 21 Club? A. Yes.

Q. In the course of your examination did you also inquire as to the correctness reported for the partnership known as the 311 Club?

A. We did.

Q. You and Mr. Farley together? A. Yes.

Q. And you participated in that examination?

A. Yes, I did.

Q. And does your name appear with Mr. Farley's on the report that was written?

A. Inasmuch as it was a combined report of Mr. Farley and myself, our names appear upon the reports, regardless of who may have written the report.

Q. You worked as a team?

A. That is correct.

Q. And in the course of this examination which you made, did you also inquire into the correctness of the income report for the San Diego Social Club? A. We did.

Q. And were you permitted to examine all of the records of [762] those three businesses which you wanted made available to you?

A. I would say all the available records, yes.

Q. Nothing was withheld from you, is that correct? A. No, sir.

Q. And those were made available to you for as long as you wanted them? A. They were, yes.

(Testimony of Glenard Gould.)

Q. And you returned them to Mr. Pechart and Mr. Kessel's office voluntarily?

A. They were never taken out of their office.

Q. You had them across the street, is that correct?

A. All the records were across the street.

Q. You did make use of those for as long as you wanted, I take it? A. That is right.

Q. And you wrote your report after you had made such use of those records as you desired?

A. That is the customary procedure.

Q. And that was followed in this case?

A. That is right.

Q. Now you testified, Mr. Gould, as to the investment account which you found in the books of the 21 Club at the 31st day of December, in the years 1943, 1944, 1945, and 1946, and I believe you also testified that you made a copy of the investment account at December 31, 1946, broken down between the partners [763] on that date, December 31, 1946, is that correct?

A. I testified I had made a transcript from the records, that is correct.

Q. And that record contained a breakdown as between three partners on that date?

A. That is my recollection, yes.

Q. Do you know whether the records showed the breakdown as between the three partners at the end of the earlier years, namely, 1943, 1944, and 1945?

A. That I can't recollect.

(Testimony of Glenard Gould.)

Q. In any event, the copy which you made does not contain such a breakdown?

A. It does not.

Q. Now, Mr. Gould, in computing the income of an individual member of a partnership on the net worth basis, is it necessary for you to have the breakdown of that individual partner's portion of the total investment account at the beginning and the end of each year involved in that investigation?

Mr. Campbell: Objected to as calling for his legal conclusion.

The Court: He may answer the question. Do you understand the question?

A. Yes, I do, sir. If you were attempting to make a net worth basis, it would be necessary to have a starting point and a closing point and if you were attempting to make a [764] reconciliation on a net worth basis between the years, it would be necessary.

Q. So that if you were then attempting to establish the income by the net worth method of any of the partners in the 21 Club during the years covered by your investigation, it would be necessary for you to have the amount of the investment account of that particular individual partner at the beginning and end of each year, is that correct?

A. No, sir.

Q. Then I misunderstood your answer.

A. I answered you that if I were breaking it down into years, it would be necessary. If I was building net worth statement from a given period

(Testimony of Glenard Gould.)

of time, say 1938, and closing in 1946, and attempting to make a reconciliation, it would not be necessary to make a reconciliation between years.

Q. Let me see if we understand each other. Let us take the year 1946. You testified that you got from the books of the 21 Club the portion of the investment of the 21 Club allocated on those books to Mr. Remmer at the end of 1946. In order for you to compute Mr. Remmer's income for the year 1946, on the net worth basis, would you have to have the amount of the investment allocated to him at the beginning of 1946?

Mr. Campbell: I submit this question is incompetent, in that the witness has not testified he was investigating Mr. Remmer. He was investigating Mr. Pechart and Mr. Kessel. [765]

Mr. Avakian: Do you wish to hear from me?

The Court: He may answer. Read the question.

(Question read.)

The Court: Do you understand the question?

A. I understand the question.

Q. Can you answer it?

A. If I was examining Mr. Remmer's account and building net worth statement for Mr. Remmer for 1946, it would be necessary to have a beginning and closing as the beginning and closing of the year.

Q. Your answer to my question then is yes, is that right? A. Yes.

Q. And the same would be true of each of the other partners, would it not? A. Yes.

(Testimony of Glenard Gould.)

Q. And the same would be true with respect to the year 1945, would it not? A. That is true.

Q. And with respect to the year 1944, also?

A. Yes.

Q. In your examination of the investment account of the 21 Club, did you find any record in the papers which you examined indicating that Mr. Remmer had ever actually withdrawn any money from the 21 Club?

A. That I can't answer. [766]

Q. You testified that as of December 31, 1946, there had been transferred into the capital account of Elmer Remmer a loss of \$4,215.49, is that correct? A. Yes.

Q. Did you find in that capital account any entry showing a withdrawal of any profits by Elmer Remmer?

A. There is nothing in this transcript to that effect.

Q. That transcript covers the investment account, does it not?

Mr. Campbell: Wait a minute—for what period? The question is misleading.

Q. For 1946.

The Court: Read the question.

(Question read.)

Mr. Campbell: I submit the document speaks for itself.

The Court: He may answer the question.

A. There is nothing in this transcript that would

(Testimony of Glenard Gould.)

indicate any withdrawals because it is only a closing balance sheet at the end of the period.

Q. And your testimony is that you do not know at this time whether or not the records showed anything in respect to any withdrawals by Elmer Remmer? A. I do not.

Q. Do you have any papers here in Carson City from which you could determine whether or not you found such an entry in the records? [767]

A. I do not.

Q. Is there some particular reason why you were not concerned with the matter as to whether or not monies had been withdrawn in the partnership?

A. That is not a consideration in determining income or net worth basis as we would make an examination

Q. In other words, the amount of income which an individual partner has to report as his share of the partnership income is not based on the withdrawals he makes, is that correct?

A. That is correct.

Q. Rather it is simply a portion which represents his percentage? A. That is correct.

Q. And it does not matter whether he withdraws more or less? A. That is correct.

Q. I am going to hand you plaintiff's Exhibit 104 for identification, and without telling me what is on this document, will you state whether or not you recognize the notations in handwriting on page 8 thereof?

A. Do I recognize the handwriting?

Q. Yes. A. No.

(Testimony of Glenard Gould.)

Q. You do not know whose it is?

A. I do not.

Q. Were you present in the courtroom this morning when Mr. [768] Campbell produced from his files the documents which were marked for identification as prosecution's Exhibits 102, 103, 104 and 105? A. No, sir.

Q. I will ask you to look at these documents and the record will show that they were produced by Mr. Campbell from his files, and will you determine, after you have examined them, whether those are copies of the reports which you and Mr. Farley made? A. They are, sir.

Mr. Avakian: Your Honor, I will request that this now be marked in evidence.

The Court: You offer them in evidence?

Mr. Avakian: Yes, I will be happy to have them marked as defendant's exhibits.

The Court: All right, they will be marked defendant's T.

Mr. Avakian: Are they all four being marked as one exhibit?

The Court: How do you want them marked?

Mr. Avakian: Perhaps it might be better to have each one marked separately.

The Court: Very well, they will be marked separately. No. 102 will now be T, 103 will now be U, 104 will now be V, 105 will now be W. They will be admitted in evidence. [769]

Mr. Avakian: Your Honor, may I hand those exhibits to the witness?

(Testimony of Glenard Gould.)

The Court: Yes, sir.

Q. Will you refer first to defendant's Exhibit T, which is the report prepared by Mr. Farley and yourself on the operations of the 21 Club and San Diego Social Club for the year 1943, and will you turn to the page entitled "Preliminary Statement." I call your attention to the statement at the bottom of that page, reading as follows: "Other information. The income and expenses of this partnership were reported in error on an individual return under the name of Joseph Billington DBA San Diego Social Club." Can you explain to us, Mr. Gould, what you mean by that statement?

A. This report was not prepared by myself.

Q. Do you know what that statement means?

Mr. Campbell: Objected to. He didn't prepare the report. The statement speaks for itself.

The Court: If he knows what it is, he may answer the question.

A. No, I do not.

Q. Can you state, Mr. Gould, whether the income of this business, as you found it in the investigation which you and Mr. Farley made, was different in any substantial respect from the income of that business reported on the individual return of Joseph Billington? [770]

Mr. Campbell: Which business are you referring to?

Mr. Avakian: The business this exhibit refers to, report denominated 21 Club and San Diego Social Club.

(Testimony of Glenard Gould.)

Mr. Campbell: That is objected to on the grounds the witness stated he did not prepare this record.

The Court: Read the question.

(Question read.)

Mr. Campbell: And the further objection, it is asking him to attempt to explain without showing him the two exhibits to be compared.

Mr. Avakian: I asked him if he knew, your Honor.

The Court: You may answer.

A. I think the report speaks for itself.

Mr. Campbell: Well, do you know?

A. Yes, I do know. It is shown on Schedule I, net income, after delinquent, was \$2,574.94. It was corrected, \$3,574.92, which would indicate no change.

Q. Would you refer, Mr. Gould, to defendant's Exhibit U, which is denominated as a report prepared by yourself and Mr. Farley for Joseph Billington DBA 21 Club, for the year 1944. Do you have that before you?

A. Joseph Billington DBA 21 Club, 1944, yes.

Q. If you will refer to the last page of that report, I will call your attention to the Schedule 2, which contains a distribution of income, showing 50 per cent distribution to Elmer [771] Remmer, 25 per cent distribution to Walter M. Pechart, a 25 per cent distribution to David N. Kessel. This does represent an examination of the partnership business which the report describes, does it not?

(Testimony of Glenard Gould.)

A. Yes.

Q. Now would you refer to the page entitled "Preliminary Statement" to refresh your recollection, and tell us the amount of adjustments which you made on your report with respect to the return that had been filed?

A. May I say again I did not write this report?

Q. This represents the team work of yourself and Mr. Farley, does it not?

A. I can only give you what appears on the report itself.

Q. Will you give us that?

A. That adjustment is up to date with \$201.55.

Q. And that was in comparison with a net income disclosed on the return of \$3,799.85?

A. That is correct.

Q. Is it customary in your investigations, Mr. Gould, for you to find adjustments in amounts that you just mentioned, namely approximately \$200, do you frequently find small adjustments of that kind in your audits? A. Very definitely.

Q. Nothing unusual about that, is there?

A. That's correct. [772]

Q. That \$201.55 adjustment represented an increase in the income of the partnership, is that correct? A. That is correct.

Q. I call your attention now to defendant's Exhibit V, is that the report dated July 27, 1948, for the year 1945? A. Yes, sir.

Q. On the business known as the 21 Club and San Diego Social Club? A. Yes, sir.

(Testimony of Glenard Gould.)

Q. Would you refer to the page in that exhibit which is on the printed form designated "Adjustments to net income," Mr. Gould?

A. Yes, sir.

Q. And that shows net income as disclosed by the return of \$43,297.67? A. That is correct.

Q. And as a result of the audit an adjustment was made in this report, increasing that income by \$856.78, is that correct?

A. That is correct.

Q. Now would you refer to the next page and explain to us the nature of the items and the amounts of the items making up that net adjustment?

A. May I state also that I did not make this report?

Q. Yes.

A. So I am only reading from the report.

Q. Yes. [773]

A. Item 1 says all expenses of the San Diego Social Club were paid out of income before arriving at the net would have been a loss. In the return the allowable expenses were added back to the net wins and losses in arriving at gross income. However, amounts paid for capital expenditures were omitted. Amounts disbursed for capital expenditures was added to net wins and losses in computing gross income.

Q. And what is the amount of that adjustment?

A. The amount of that adjustment is \$6,986.23.

Q. Apparently you and I are not reading——

(Testimony of Glenard Gould.)

A. Pardon me—Item 1, capital expenditure credit to gross income \$8,874.40.

Q. So that we may understand fully what that means, Mr. Gould, will you state to me whether I am correct in this question. Does that mean that you in effect disallowed as a current business expense the sum of \$8,874.40, on the ground that it represented capital expenditure which the taxpayer should deduct on a depreciation basis over a period of years?

A. It could be that. Not knowing what it was, I couldn't answer, but it obviously would be a non-allowable deduction which should have been capitalized.

Q. And based on your experience as a revenue agent, would you say that the term "Capital Expenditures" refers to such things as money invested in a piece of machinery, which has a life over a period of several years, or in a building which has a [774] profit over a period of several years? A. It could be.

Q. And expenditures of that kind should not be deducted in the year of expense, is that correct?

A. That is correct.

Q. But rather a proportionate amount should be deducted year to year during the life of the item? A. If it is a depreciable asset, yes.

Q. In your investigation and audits as revenue agents, do you frequently find that taxpayers take as a current expense items which you, as revenue

(Testimony of Glenard Gould.)

agents, feel should be capitalized as capital expenses?

Mr. Campbell: Objected to as immaterial. We are concerned with one man's income and this man's experience with other taxpayers has no bearing here.

The Court: Objection overruled. Answer the question.

A. Yes.

Q. And then would you state item two of that adjustment?

A. Item 2 says, "Fines and legal expenses, \$1,750."

Q. That represented an expenditure by this partnership business by the way of payment of fines and legal expenses which you feel under the law were not deductible?

A. It is not a question what I felt, it is a question of law.

Q. Your understanding of the law was that that was not deductible? [775] A. That is right.

Q. Would you explain the next item, Item 3, entitled, "Bonus to Joseph Billington, 21 Club."

A. Well, it appears that the item says, "Bonus paid to Joseph Billington computed at 5 per cent of net wins of \$72,763.34, is allowed as deduction instead of distribution to a partner. Joseph Billington was an employee and not a partner."

Q. So that we may get that clear, Mr. Gould, on the return that had been filed, Mr. Billington had been shown as a partner with a share of \$3,638.17? A. Yes.

(Testimony of Glenard Gould.)

Q. And you determined that instead of treating that as a partnership share it should be treated as a salary expense?

A. Yes, either salary or commission.

Q. Commission would be by way of additional salary, would it not? A. That is right.

Q. Now, Mr. Gould, insofar as the portion of this partnership income which is taxable to Elmer Remmer is concerned, does it make any difference whatsoever whether that amount of \$3,638.17 is treated as a salary deduction to Joseph Billington rather than a partnership share of Joseph Billington?

A. You mean would it change the amount that would be reportable by Mr. Remmer?

Q. Yes. [776] A. No.

Q. I call your attention to prosecution's Exhibit 55, which is a partnership return of income of Joseph Billington DBA 21 Club and San Diego Social Club for the year 1945, and I call your attention to Schedule I on the last page, which shows as a partnership share of Joseph Billington the sum of \$3,638.17, is that the item to which the adjustment in your report relates?

Mr. Campbell: I am going to make the objection, it seems to me we are going far afield from the direct examination of this particular witness, who was produced simply to produce a transcript which had been taken from the 21 Club books. I am going to make the objection, in the interest of time, that this is not within the scope of direct examination.

(Testimony of Glenard Gould.)

The Court: May I have the question?

(Question read.)

Mr. Campbell: I object it is not within the scope of direct examination, which simply resulted in the production of transcript made of certain figures appearing in certain books which he was shown, and in the interest of time I make the objection that this is not within the scope of direct examination.

The Court: Objection overruled.

A. It would appear to be the same item.

Q. Did I understand you to say, insofar as that item is concerned, it had no effect whatsoever on the amount of income [777] taxable on Mr. Remmer's return? A. Yes.

Q. Now the next item of adjustment in defendant's Exhibit V, report of 1945, is adjustment of depreciation taken on the return, is that correct?

A. Yes, sir.

Q. Would you explain that adjustment and give us the amount of it? Do you have the page to which I refer? A. I presume it would be page 7.

Q. Well, I was referring—

A. (Interrupting): To get the details, you would have to refer to page 7, which is self-explanatory.

Q. Well, I want you to explain it for us, using whatever material you need. Would you explain what that adjustment was?

A. Just simply that the agent determined that

(Testimony of Glenard Gould.)

the life years was too excessive and gave the items a longer life than had been claimed for the return.

Q. Perhaps I misunderstood you. You mean that the agent felt that the life of the asset was longer than the taxpayer felt it was? A. Yes.

Q. And if the life was longer than the amount of depreciation deducted each year was less, is that correct? A. That is correct.

Q. So this adjustment simply represents a revision by the revenue [778] agents of the estimated useful life of the assets covered by the depreciation schedule? A. Yes, sir.

Q. And Mr. Gould, isn't it customary in your analysis of returns and the auditing of returns, for you to find on many occasions that adjustments of this kind are made as a result of the audit?

A. Yes.

Q. There is nothing unusual about this type of adjustment, is there? A. No, sir.

Q. And that represents the total adjustments that were made in that report, does it not, Mr. Gould? A. Yes.

Q. Now would you refer to defendant's Exhibit W, which is dated September 8, 1948, and represents the reported audit by Mr. Farley and yourself for the year 1946 of the 21 Club and the San Diego Social Club. Would you refer to Schedule No. 1, showing adjustments to net income and tell us the total amount of the net adjustment which was made? A. That adjustment was \$3,166.72.

(Testimony of Glenard Gould.)

Q. And that represented a reduction of the loss shown on the return, is that correct?

A. Yes, sir.

Q. The return showed loss of \$9,872.91? [779]

A. Correct.

Q. And by this adjustment you reported \$6,-706.19? A. Yes, sir.

Q. Would you explain the items that went into that adjustment, Mr. Gould?

A. (a) Depreciation of \$361.98; (b) accounts payable \$2,804.74.

Q. Would you explain the depreciation adjustment that was made?

A. Well, the depreciation adjustment was a depreciation of a prior year.

Q. Your explanation would be the same?

A. That is right; and account payable item, (b) closed over the year 1946 was determined that no liability existed for \$2,804.74 for the accounts payable which were on the books of account as 12-31-46 the accounts payable were written off and amounts credited to investment account. Again we do not know whether expenses for the prior year were overstated. The amount \$2,804.74, which was credited to investment account is included as income for the year 1946.

Q. In other words, you and Mr. Farley found in the investment accounts this accounts payable, \$2,-804.74 and you were unable to determine the exact facts in respect to it, is that correct?

A. I would say, yes.

(Testimony of Glenard Gould.)

Q. And in your experience as a revenue agent, Mr. Gould, would you say that it frequently occurs that when you find items for which you cannot find a complete explanation, if there is some [780] indication that that might have been income, you write it up in your report as income? A. We do.

Q. And there is nothing unusual about that, is there? A. No, sir.

Q. Mr. Gould, are you able to state, either from your personal recollection or from any papers which are here, whether, in the expenses of the 21 Club and San Diego Social Club, there was included any deduction on account of rent paid?

Mr. Campbell: That is a compound question, including both the San Diego and 21 Club.

Mr. Avakian: It is the same real property, your Honor.

The Court: You may answer the question.

A. I could not say.

Mr. Avakian: No further questions.

Redirect Examination

By Mr. Campbell:

Q. Mr. Gould, Mr. Avakian has asked you certain questions as to your recollection of what the books themselves contain, both as to the distribution of the investment account and what the books show as to rent. How long ago was it that you examined those records? A. Close to five years.

Q. If you had the records before you, would you be able to turn to those accounts?

(Testimony of Glenard Gould.)

A. No, sir; not without looking over and determining what the [781] account would be.

Q. You would have to re-examine the books, is that correct? A. That is correct.

Q. As I understood you to say, you examined no books of the San Diego Social Club?

A. There were not any books, as I recall.

Q. There were no books?

A. That is right.

Q. Now, you were shown this partnership return of income for 1945, Exhibit 55. I believe your attention was addressed to defendant's Exhibit V, changes which were made in the distribution of income from your report. Did you observe on plaintiff's Exhibit 55 Mr. Billington is reported to have received the sum of \$3,638.17 as his distributive share and your attention was directed to defendant's Exhibit V to the fact that you had made an adjustment by deducting the amount of \$3,638.17, not as a partnership distribution, but as a bonus paid to Joseph Billington and therefore an expense, is that correct? A. Yes, sir.

Q. Now, if it appeared, Mr. Gould, that Mr. Billington received no part of that \$3,638.17, that in turn would increase the distributive share of the partners Remmer, Pechart and Kessel by that amount, would it not?

Mr. Avakian: Objected to on the ground it assumes a fact contrary to the evidence. There is no evidence in this case [782] that Mr. Billington received no part of that amount.

(Testimony of Glenard Gould.)

The Court: Objection overruled. You may answer the question. I did not take it that the question assumes that this is in evidence, it merely asked if it appeared.

Mr. Avakian: May we have the question read first?

(Question read.)

Mr. Avakian: That is not the evidence in this record.

The Court: I know, there is no implication it is in evidence.

Mr. Avakian: Then it is a hypothetical question. He says "if it appears."

The Court: It is an explanation of counsel, as I see it, is all. Objection overruled. Answer the question. Let us have the question read. I think the witness is in doubt.

A. No, I know the question.

Mr. Campbell: I will reframe the question.

Q. If, in preparing this report, it had come to your attention that the sum of \$3,638.17 was not in fact paid to Joseph Billington, how then would you have treated that in your adjustment?

Mr. Avakian: We wish to object to that on the ground this is a hypothetical question, which is speculative and has no basis in the evidence. If the prosecution can show that the assumption which the witness is being asked to make is a fact, [783] then at that time, and at that time only, would it be proper to ask this question.

The Court: We have to have items mentioned

(Testimony of Glenard Gould.)

here and this question, it would seem to me, was maybe the effect of the item or the absence of the item, that is my understanding. I do not consider that it is intended, and if it is intended I believe the jury should be informed now, that there is no evidence in the record to that effect.

Mr. Campbell: No, your Honor, I think the record should speak for itself. I think the record is clear in that connection.

The Court: Let us go on with this. I am going to overrule the objection.

Mr. Avakian: May I call your attention to the record—

The Court: Let us not do it now.

Mr. Avakian: May I continue the statement of my objection?

The Court: Yes, you may.

Mr. Avakian: My point is this, your Honor. We are already engaged in the third week of this trial and it is very apparent it is going to be very lengthy—

The Court (Interceding): That has nothing to do with it. If we are here ten years it would make no difference. [784]

Mr. Avakian: May I complete my statement?

The Court: Yes, but do not make a speech.

Mr. Avakian: I do not intend to make a speech. I want to state the record should not be encumbered, particularly in a long trial, with immaterial matter.

The Court: That is a matter for the Court to

(Testimony of Glenard Gould.)
determine. The objection is overruled. The witness may answer the question.

A. Inasmuch as this venture was on a cash basis, the item would not be allowed under those circumstances.

(Jury and alternate jurors admonished and 15-minute recess taken at 2:20 p.m.)

2:35 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. GOULD

resumes the witness stand.

Mr. Campbell: If the Court please, I wish permission to reopen on direct for one or two questions.

The Court: Very well.

Direct Examination

By Mr. Campbell:

Q. Mr. Gould, I show you plaintiff's Exhibit 107 for identification. Do you recognize that letterhead as the official letterhead of the United States Treasury Department? [785] A. I do.

Q. I call your attention to the signature of the gentleman attached thereto. Do you know what position he occupies with the Bureau of Internal Revenue? A. I do.

(Testimony of Glenard Gould.)

Q. What is his position?

A. Deputy Commissioner.

Mr. Campbell: This will be offered in evidence as government's Exhibit 107.

Mr. Avakian: Your Honor, we wish to make an objection to the offer of this document in evidence upon several grounds and after I have stated my position with respect thereto, I would like to hand it to your Honor so your Honor can evaluate the argument accordingly. First of all, we object on the ground that this document is entirely hearsay and extra-judicial statement submitted by a man in Washington, not under oath, and not present here in the court room. Secondly, the introduction of this document in evidence would deprive us of the opportunity of cross-examination of the man who wrote it to determine what steps he took and the search he made, what records are in existence and how diligently he attempted to find the document that is mentioned in this letter. Your Honor will observe, from reading it, that this letter is being offered for the purpose of proving the truth of the statement made in the letter. It is a fundamental proposition. The facts, if they [786] are going to be introduced in evidence, must be introduced judicially under oath by the man whose knowledge of them should be subject to cross-examination by the opposition. I know of no exception to the hearsay rule which would authorize the receipt in evidence of this document.

Mr. Campbell: May I suggest to the Court that

(Testimony of Glenard Gould.)

as the Court examines it, it recalls the manner and circumstances under which the defendant offered in evidence Exhibit M, which the Court received over the government's objection at that time.

Mr. Avakian: May I state to your Honor, in response to that, that the letters to which the prosecution refers were letters written to us by the prosecution, that is, by an agent of the representative of the Treasury Department. We were not offering them as our self-serving statements, but offering them as statements made by them to us and that comes within the well recognized exception of the hearsay rule. This is offered on the part of the prosecution as self-serving statement by one of its representatives, and not under oath, and not subject to cross-examination.

Mr. Campbell: Also Exhibit K.

The Court: Do you recall on whose examination Exhibits M and K were offered?

Mr. Campbell: Yes, Mr. Weisz.

Mr. Gillen: Your Honor will readily see the distinction [787] there, I am sure.

Mr. Avakian: May I make a further observation after your Honor has examined those documents?

The Court: Yes, you may.

Mr. Campbell: I ask in examining the proffered government exhibit the Court also examine the attachment to that letter.

Mr. Avakian: I believe Exhibit K also is similar, your Honor.

The Court: I will sustain the objection.

(Testimony of Glenard Gould.)

Mr. Campbell: I wish to disengage from this exhibit that portion which has heretofore been certified, the attachment, and ask it be marked 107-A for identification. I will offer 107-A in evidence as a duly and properly certified public document.

Mr. Avakian: Your Honor, we are willing to stipulate that these two documents which have just been offered as Exhibit 107-A, may be received in evidence.

The Court: You consent that 107-A be admitted in evidence.

Mr. Avakian: Yes, that is right.

The Court: It will be admitted.

Mr. Campbell: That is all.

Mr. Avakian: Your Honor, at this time I would like to read to the jury these two letters which have just been received in evidence as prosecution's Exhibit 107-A. This document [788] consists of the certification by the Secretary of the Treasury that the two documents attached are correct photostatic copies. There are two letters and I will read them in chronological order. The first is a letter on the letterhead of John R. Golden, Mills Building, San Francisco, October 11, 1951, which bears the stamp of the Bureau of Internal Revenue, Naval Room, 1951 October 13 a.m. 11:40, and the further stamp, "Received Photostat Unit October 13, 1951, Records Division." The body of the letter, which is entirely in typewriting except for the signature, is as follows: (Reads letter.)

The second letter bears date October 22, 1951. It

does not contain any letterhead. It has typewritten designation "IT:REC:P" and underneath that the letters, "ODJ." All that in typewriting, as well as the body of the letter, which is as follows: (Reads letter.)

No further questions.

(Witness excused.)

OGDEN MONAHAN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Ogden Monahan.

Q. Where do you live?

A. 807 Dolores, San Francisco.

Q. What is your business? [789]

A. Presently employed Pacific Turf Club, Golden Gate Fields.

Q. Mr. Monahan, are you acquainted with the defendant in this case, Elmer F. Remmer?

A. I am acquainted with Mr. Remmer by sight only.

Q. In the year 1937 did you have occasion to bring an action against Mr. Remmer in the Superior Court, State of California, in and for the County and City of San Francisco?

A. It is my recollection that the incident that brought about the action took place in 1938.

Mr. Gillen: Just a moment. I wish to offer

(Testimony of Ogden Monahan.)

an objection; the answer is not responsive, so far as it has gone, to the question.

The Court: It may go out. Let us have the question read and please just make your answer in accord with the question.

(Question read.)

The Court: That can be answered yes or no.

A. Well, your Honor, I am confused as to what is termed an action.

The Court: Well, maybe counsel can reframe the question.

Mr. Gillen: I will stipulate counsel means lawsuit.

Q. That is right—did you bring a lawsuit against Mr. Remmer? A. Yes, I—

The Court: You have answered.

Q. Was that lawsuit filed in the Superior Court of the State [790] of California, in and for the City and County of San Francisco?

A. I believe it was.

Q. Did you obtain a judgment in that action?

A. Yes, sir.

Mr. Thompson: If the Court please, we offer in evidence plaintiff's Exhibit 109 for identification.

Mr. Gillen: To which we have the objection it is incompetent, irrelevant and immaterial.

The Court: You have seen it?

Mr. Gillen: Yes, your Honor, back in 1937. That was beyond the period of time involved in the indictment.

(Testimony of Ogden Monahan.)

Mr. Thompson: If your Honor will also examine plaintiff's 108 for identification, I think the materiality will become apparent.

The Court: Have you seen both these exhibits?

Mr. Gillen: Yes, your Honor. Was the other offered also?

The Court: I have not heard of the offer here. Do you offer the other?

Mr. Thompson: I offer both, your Honor.

Mr. Gillen: To which offer we must object. It is an incident arising back in 1937, long prior to the starting point in this action, which is the year 1944.

The Court: I do not think the objection would apply to 108. [791]

Mr. Thompson: Well, if your Honor please, the judgment itself must be proved in order to show the amount of the obligation.

The Court: It may be admitted in evidence. They could very well be admitted as one exhibit.

Mr. Thompson: Well, I handed that to the clerk together, your Honor, and they were inadvertently marked as two exhibits. I would like to read plaintiff's Exhibit 109. (Reads Exhibit 109.) I would like also to read plaintiff's Exhibit 108. (Reads Exhibit 108.)

Q. Mr. Monahan, you are the Ogden F. Monahan named as plaintiff in that action?

A. I am.

Q. And the defendant here, Elmer F. Remmer, is the defendant in the action just referred to?

(Testimony of Ogden Monahan.)

A. He is.

Q. Did you, prior to September, 1945, receive any payment on account of the judgment for \$1800?

A. None whatever.

Q. And full payment was finally made in September of 1945, as shown by the satisfaction of judgment?

A. Full payment was made to me by my uncle at a little later date. He had full authority to act for me.

Q. The money you received, in any event, was received after September, 1945? [792]

A. Yes.

Q. And during the year 1945?

A. That is correct.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. You say your uncle acted for you?

A. My uncle acted in all particulars in this.

Q. Now, I notice that the judgment here says that on the blank day of October, 1938—it doesn't show what date in October of 1938—that you were present in court with your attorney, Joseph E. Durham, is that correct? A. I was.

Q. And I notice that it says that just an attorney was present in court for the defendant, is that correct? A. That is my recollection.

Q. Mr. Remmer wasn't in court, isn't that true?

A. That is correct.

(Testimony of Ogden Monahan.)

Q. What is your job at—where did you say you worked?

A. Presently employed as a mutuel seller.

Q. Where? A. Golden Gate Fields.

Q. That is a race track?

A. The race track.

Q. In Albany, California?

A. That is correct. [793]

Mr. Gillen: I think that is all.

(Witness excused.)

SYLVAN LANDO

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Sylvan Lando.

Q. Where do you reside?

A. 611 Marina Boulevard, San Francisco.

Q. What is your business or occupation?

A. I have no business.

Q. What was your former business or occupation?

A. Well, I raced horses practically all my life.

Q. Are you acquainted with the defendant, Elmer Remmer? A. I am.

Q. How long have you known him?

A. To the best of my recollection about thirty years.

(Testimony of Sylvan Lando.)

Q. Have you ever been in business with Mr. Remmer? A. I have.

Q. And what was the first date that you became interested in a business with Mr. Remmer?

A. I just don't recollect the date, but it was in the month of December, I think, in 1941.

Q. What was the name of that business?

A. The B & R Smoke Shoppe. [794]

Q. And where was the B & R Smoke Shoppe located?

A. 50 Mason Street, San Francisco.

Q. And who else, if any one, was associated in that business?

A. Willie Kyne and Mr. Remmer.

Q. What was your relationship to that business, that is to say, was it a corporation, a partnership or what? A. It was a partnership.

Q. And who were the partners?

A. Willie Kyne and Mr. Remmer.

Q. And yourself? A. And myself.

Q. And were any formal papers of partnership drawn up? A. Not that I know of, no.

Q. What was it, simply an oral understanding?

A. It was an oral understanding.

Q. Now, what were the respective shares of the partners in that business?

A. I had 25 per cent, Willie Kyne 25 per cent, and Mr. Remmer 50 per cent.

Q. Now, at the time you entered into that business at 50 Mason Street, known as the B & R

(Testimony of Sylvan Lando.)

Smoke Shoppe, was that a going business operated by someone else? A. Yes, it was.

- Q. By whom had it been operated?
- A. I just don't know the person's name. [795]
- Q. Was his name Silverman?
- A. Not to my recollection.
- Q. Now who, if any one, put up the money to buy that business? A. Mr. Remmer.
- Q. Did you put any money up for that purpose?
- A. I did not.
- Q. To your knowledge did Mr. Willie Kyne put up any money for that purpose?
- A. No, he did not.
- Q. Do you know the purchase price of that business?
- A. I think it was either seven thousand—no, the purchase price, I think it was two thousand dollars.
- Q. And to the best of your recollection that was 1941, is that correct? A. That is right.
- Q. Now, after 1941, how long did that business continue to operate, or when did you leave the business?
- A. I left the business in April, 1947.
- Q. And was the business still operating at that time? A. I expect it was.
- Q. Now, let me ask you this, what was the business of the B & R Smoke Shoppe?
- A. Booking on horses.
- Q. Will you describe the premises which were used for that purpose at 50 Mason Street? [796]

(Testimony of Sylvan Lando.)

A. Well, it was a large room with a counter in it. There was an open pool room.

Q. By open pool room, you are using a term applied to a bookmaking establishment, are you not?

A. That is right.

Q. Where any one can go in and make a bet?

A. That's right.

Q. Was there not a front room which you had to enter in order to reach what you call the pool room?

A. It was just a small enclosure. There was a cigar store there.

Q. Were there any cigars in the cigar stand?

A. I don't think so.

Q. There were, however, dummy boxes?

A. That is right.

Mr. Gillen: May we have the witness testify and not Mr. Campbell?

The Court: Try to avoid leading questions.

Mr. Campbell: Very well.

Q. You say there was a cigar stand there. Was there any merchandise in the cigar stand for sale?

Mr. Gillen: Objected to, calling for opinion and conclusion.

The Court: Objection overruled.

A. I didn't get the question. Repeat it, [797] please.

Q. Was there any merchandise for sale at the cigar stand portion? A. I do not think so.

Mr. Gillen: I think I should move the answer

(Testimony of Sylvan Lando.)

be stricken because it is an uncertain answer. He said, "I don't think so."

The Court: It may stand.

Mr. Gillen: He should either say he does know or he doesn't know.

Q. You refer to it as a pool room. Was there any pool tables in the establishment?

A. No, there wasn't.

Q. Was there business conducted on those premises other than what you have referred to as the booking of horses? A. No.

Q. Now, in connection with the operation of the business of booking horses, was it necessary that there be a supply of cash or a bank roll on hand? A. That's right.

Q. And who supplied that, Mr. Lando?

A. Mr. Remmer.

Q. And what was the amount of the bank roll?

Mr. Avakian: May we have the time of that particular question fixed?

Q. Very well. When was a bank roll initially supplied? [798] A. When we opened up.

Q. And what was the amount of the bank roll?

A. It was either seven thousand or seventy-five hundred.

Q. And who supplied that?

A. Mr. Remmer.

Q. Did the amount of the bank roll vary or change during the period of time you were there?

A. I don't know. That wasn't my department.

Q. Who handled that part of the business?

(Testimony of Sylvan Lando.)

A. Willie Kyne.

Q. And who was it, in connection with the partnership, who handled the money, that is, both the receipts at the end of the day and such payments or expenses as had to be made?

A. Willie Kyne.

Q. Was Mr. Remmer himself active in the operation of the business? A. He was.

Q. Was he active in the operation of the business in the years 1944 to 1946, inclusive?

A. He was.

Q. And how often was he there during business hours?

A. Oh, he was in and out of there.

Q. Now, what were your duties in connection with that business?

A. I was the price maker.

Q. Will you state what you mean by price maker? [799]

A. There was three changes of races a day on three different tracks, about four or five hours' work to make the price, and then we had an open room and we would put the prices up in the open room.

Q. By prices do you refer to the odds which would be bet by the business to the bettor in a bet on horses on which he wagered won the race?

A. That is right.

Q. And I take it it was your job to establish in advance of the races the prices which would be offered by your establishment, is that right?

(Testimony of Sylvan Lando.)

A. That is right?

Q. And during the course of the day and before running of a particular race, would the odds change on a particular horse?

A. Well, that all depends. Yes, sir, it would.

Q. What were the circumstances that affected that?

A. Well, the amount of money that would be wagered on the horse.

Q. Would that be the amount of money wagered only in your place, or would it include taking into consideration wagers made in other booking establishments? A. No, just in our house.

Q. Now, in addition to the odds which you made and posted, will you state whether or not, when you were operating as an open pool room, the business also paid pari mutuel or track odds?

A. That's right. [800]

Q. Now, throughout the period of time which you were there, did the business continue to be operated as an open pool room; that is to say, where a person could walk in off the street and make a bet? A. It did up until the end of 1944.

Q. And was there a change in the manner of conducting the business toward the end of 1944?

A. There was.

Q. And was there some event or events that brought about or caused some change in that operation?

Mr. Gillen: I think—

A. Yes, there was.

(Testimony of Sylvan Lando.)

Mr. Gillen: Just a moment—I think that is calling for conclusion and opinion.

The Court: It is answered yes. We will see what the next question is.

Q. You understand if I hold up my hand you are not to answer, is that correct? A. Yes.

Q. What was the nature of the event or events that caused the change in the method of operation of your business?

A. We just followed suit. Every other book room closed and we closed.

Q. How long were you closed at that time?

A. To the best of my recollection not very long, maybe a month [801] or two.

Q. Who determined, that is in your partnership, if any one did, that you close at that time?

A. Mr. Remmer.

Q. In regard to such matters of operation in the conduct of the business, who determined the policy? A. Mr. Remmer.

Q. Now, when you reopened, after this short closing toward the end of 1944, what was the method of the conduct of the business?

A. We operated over the telephone.

Q. Did your so-called open pool room, that is, where the bettor could walk in off the street and into your establishment, type of operation then cease? A. That's right.

Q. Did your telephone type of operation then continue up until the time you left the business?

A. That's right.

(Testimony of Sylvan Lando.)

Q. Now, in connection with the operation of the business, Mr. Lando, did you receive what are known as lay-off bets from other bookmakers?

A. We did.

Q. Was that the situation both during the open pool room operation and during the telephone type of operation?

A. I don't quite understand. Will you repeat?

Q. Yes, I will reframe the question. Did you receive lay-off [802] bets from other bookmaking establishments during all of the time that you were connected with the business?

A. At times, yes.

Q. And were those lay-off bets received from both bookmakers in San Francisco and bookmakers in other cities? A. They was.

Q. Will you state, Mr. Lando, what is known as a lay-off bet?

A. Well, sometimes a bookmaker wants to bet on the race track if he takes an order from the owner of the horse in some city, build the odds up and protect, that is one way, and another way if a man has too much money on a horse and he doesn't want to stand to lose a big amount of money.

Q. Let me see if I get that right. You have given two instances, one is where it is desired to place money with a number of bookmakers in different cities, so as to not disturb the odds, is that correct? A. That is right.

Q. And the second is where the bookmakers feels he has too much risk on one horse, so he sort

(Testimony of Sylvan Lando.)

of shares the risk around with other bookmakers?

A. That's right.

Q. Now, in the conduct of your business did you also lay off bets yourselves? A. We did.

Q. And were those bets laid off with other bookmakers in San Francisco? [803]

A. They was.

Q. And were they laid off with other bookmakers throughout the country? A. They was.

Q. Now, who handled that part of the business?

A. Willie Kyne.

Q. Both the acceptance and the laying off of the bets? A. That's right.

Q. Did you have any duties other than the fixing of odds to be offered? A. I did not.

Q. Now, in the first phase of your business, that is to say while it was still operating as an open pool room, how many employees did you use?

A. I don't know how many we used.

Q. Do you recall how many paid writers were utilized?

A. No, but the social security should take care of that.

Q. Who handled the hiring of help?

A. Willie Kyne.

Q. Did you, yourself, participate in the writing of bets? A. When we started in I did, yes.

Q. How long did that continue?

A. Just for about a week.

Q. In other words, until you got organized and rolling? [804] A. That's right.

(Testimony of Sylvan Lando.)

Mr. Gillen: Just a moment—I move Mr. Campbell's voluntary testimony, not under oath, "until you got organized and rolling," be stricken from the record.

The Court: That was precipitated by the other answer. Read the question.

(Question read.)

The Court: It was induced by the witness' answer.

Q. Are you acquainted with a man by the name of Pritchett? A. I am.

Q. Was he active in the business of the B & R Smoke Shoppe? A. He was.

Q. What was his first name? A. Pat.

Q. What duties did he perform?

A. Well, he wrote tickets.

Q. Now, there was a period of time, was there not, Mr. Lando, when Mr. Willie Kyne was in the service? A. That's right.

Q. Do you recall what period that was?

A. 1945.

Q. Do you recall what months?

A. No, I don't.

Q. Do you recall when he returned from the service?

A. Yes, he returned in June, 1946. [805]

Q. Now, during the period of time that Mr. Kyne was in the service, who handled the financial end of the business? A. Pat Pritchett.

Q. After Mr. Kyne returned from the service in

(Testimony of Sylvan Lando.)

June of 1946, who then handled the financial end of the business?

A. He took over when he came back, Mr. Kyne.

Q. Will you state in what manner Mr. Pritchett was compensated for his services?

Mr. Gillen: I am going to object to that as calling for opinion and conclusion of this man, who has already stated his only duties there were the fixing of prices on odds.

The Court: Objection overruled. He may answer the question.

Q. Do you understand my question?

A. No, I do not.

(Question read.)

A. I don't know. He might have been paid at the end of the month.

Q. Well, how was he paid; was he paid a percentage or salary or how?

A. He was paid a salary.

Q. Do you recall what that salary was?

A. No, I do not know.

Q. Was Mr. Pritchett ever given a percentage in the business? A. Not that I know of.

Q. Now, during the war, Mr. Lando, there was a period, was there [806] not, when all of the race tracks were closed down? A. That's right.

Q. Do you recall when that was? A. 1945.

Q. And do you recall what part of 1945?

A. From the first of January until up until May 15th.

(Testimony of Sylvan Lando.)

Q. And did the B & R Smoke Shoppe conduct business during that period?

A. They did not.

Q. If you recall, was Mr. Kyne in the service during that period? A. I believe he was.

Q. Now, in connection with the operation of the business, how often, if at all, would the partners have an accounting as to the profits or losses?

A. At the end of each year.

Q. By the end of each year, do you refer to the calendar year? A. That's right.

Q. Now, in addition to your partnership share, did you also draw salary or compensation of any kind?

A. I didn't draw no salary, now.

Q. Do you know if Mr. Remmer drew any salary? A. I do not know.

Q. Do you know if Mr. Kyne drew any salary?

A. Yes, he did. [807]

Q. Do you recall the amount of Mr. Kyne's salary, if you know? A. It was ten dollars a day.

Q. Did that continue during the period of time that Mr. Kyne was in the service?

A. To my knowledge, yes.

Q. To the best of your knowledge?

A. That's right; to the best of my knowledge.

Q. Now, Mr. Lando, in the event you, or the other partners, required money to be drawn from the business during the course of the year, was some method worked out for that purpose?

A. That's right.

(Testimony of Sylvan Lando.)

Q. And what was the method used?

A. Well, if I wanted to draw any money, I would just put a marker in.

Q. What do you mean by a marker?

A. The same as an IOU, along those lines.

Q. And to whom would you give that marker?

A. Willie Kyne.

Q. Now, what would occur—assuming, for example, that you drew \$200 and gave a marker, what would next occur in relation to that? What would you do next? A. Just get the money.

Q. And from whom would you get the money?

A. I didn't understand.

Q. Who would give you the money? [808]

A. Willie Kyne.

Q. He handled the money?

A. He handled the cash, yes.

Q. And when he was away, Mr. Pritchett handled it? A. That's right.

Q. Prior to the end of the year, would you pay the amount of that marker back to the money keeper?

A. Well, I have at times and other times would carry it along, might carry it over.

Q. So that, I take it, there would be—

Mr. Gillen: Pardon me—I wonder if counsel would not take it and let us get the evidence from the witness.

The Court: All right.

Mr. Campbell: I just frame my questions in my own way.

(Testimony of Sylvan Lando.)

The Court: Go ahead and frame your question.

Q. At the end of the year, when you had your accounting period, would all of the money in the bank roll, plus accumulated profits, be represented by cash or by cash and markers?

A. By cash and markers.

Q. And when the accounting of profits were had, would it be had upon that basis of a division based upon the amount that might be owed by any of the partners to the bank roll? Do you understand me?

A. No, I don't. I would like to have the question repeated.

Mr. Campbell: I will withdraw the question. I will ask [809] you another.

Q. Mr. Lando, did you have anything to do with the preparation and filing of partnership tax returns for the B & R Smoke Shoppe?

A. I did.

Q. And what did you have to do with the preparation of the returns?

A. Maybe I don't understand you right.

Q. Did you have anything to do with the preparing the partnership returns of income, the income tax return?

A. No, I didn't; I misunderstood the question. I was referring to my own.

Q. No, I am referring to the partnership return.

A. I understand now; no, I didn't.

(Testimony of Sylvan Lando.)

Q. Who, if you know, did have that duty for the partnership? A. I don't know.

Q. Do you recall whether or not you ever saw the returns?

A. No, I don't believe I ever did.

Q. I am going to show you government's exhibits 77, 78, and 79, which are the partnership returns of income of the B & R Smoke Shoppe for the calendar years 1943, 1944, and 1946, and ask you if you have ever seen those documents before? A. No, I never saw them before.

Q. I call your attention, however, to the fact that each of these documents is signed William E. Kyne, and ask you if you are familiar with his signature? [810] A. I am.

Q. And is that his signature?

A. It appears to be, yes.

Q. Now, I call your attention, Mr. Lando, to the fact that the partnership returns which I show you does not include a partnership return for the calendar year 1945, which return would have been due for filing not later than March 15th of 1946. Now, who was it that had financial charge of the business in March of 1946?

A. You say there was none filed, did I understand you to say?

Q. I am asking you who had financial charge of the business in March of 1946?

A. Why Pat Pritchett.

Q. Do you yourself know whether or not any 1945 partnership return for the B & R Smoke

(Testimony of Sylvan Lando.)

- Shoppe was prepared? A. I know I filed.
- Q. You are referring to your personal return?
- A. That's right.
- Q. But do you know whether or not any partnership return was prepared? A. No, I do not.
- Q. Mr. Lando, are you acquainted with a business known as the 186 Club? A. I was.
- Q. And where was that located? [811]
- A. 186 Eddy Street, San Francisco.
- Q. And what was the nature of the business conducted there?
- A. The 186 Club was a card room in back and in front was the wholesale liquor store and cigar counter.
- Q. Was that the Day and Night?
- A. Known as the Day and Night, yes.
- Q. Now, did you yourself have anything to do with the operation of the 186 Club?
- A. I did not.
- Q. Are you familiar with the fact that the 186 Club was a corporation? A. Yes, I was.
- Q. When did you first learn that?
- A. About a year after it opened.
- Q. Now, when did it open?
- A. I think it was opened in '43, if I am not mistaken.
- Q. Were you an officer of the corporation?
- A. I was.
- Q. When did you first become an officer of the corporation?
- A. When it started; when it opened.

(Testimony of Sylvan Lando.)

Q. When did you first learn that you were an officer of the corporation?

A. About a year after it was opened.

Q. Do I understand you had been an officer for a year without knowing it? [812]

Mr. Gillen: I object to the form. It is cross-examination; it is argumentative and it is the characterization and assumption of the examiner.

The Court: Perhaps you could change the form of the question.

Q. How did you learn that you were an officer of the corporation? A. From Willie Kyne.

Q. Now, you say that the 186 Club started in 1943. When was it that Willie Kyne told you that you were an officer?

A. Well, after it was changed from a partnership to a corporation.

Q. When was that, do you recall?

A. It was opened in '43. It was in '44.

Q. That it became a corporation?

A. To my knowledge, yes.

Q. Had you been a partner?

A. I had been.

Q. When? A. When it started.

Q. What was your partnership interest?

A. In the 186 Club?

Q. Yes. A. I had one-sixth interest.

Q. Did you contribute any money or capital toward the 186 Club? [813] A. I did not.

Q. At any time? A. No, I didn't.

(Testimony of Sylvan Lando.)

Q. When did you first learn that you were a partner in the 186 Club?

A. As I said, after it was changed from a partnership to the corporation—I am all confused now.

Mr. Gillen: I am going to offer the objection it has been asked and answered. He said he became a partner when it opened and then changed.

The Court: The objection will be overruled. I don't think the witness quite understood the question.

Q. I will repeat the question. When did you first learn that you were a partner in the 186 Club?

A. When it opened.

Q. Who were the other partners?

A. Mr. Remmer and Mr. Kyne, Bert Pistanio, Attilio Cassilini, Carl Nellus, Jess Kopstick.

Q. What interest did each of the partners have?

A. To my knowledge—one-sixth apiece.

Q. How did you obtain that knowledge?

A. Mr. Remmer.

Q. Did you ever receive any salary from the 186 Club?

Mr. Gillen: Just a moment—objected to as incompetent, irrelevant and immaterial, whether he received a salary as a [814] partner or as an officer of the corporation.

The Court: Objection overruled. You may answer the question.

Mr. Avakian: Your Honor, may we add to the grounds of that objection, I think your Honor is aware of the fact the 186 Club was a corporation

(Testimony of Sylvan Lando.)

and the question as to whether an officer of a corporation, such as the witness, received a salary, I submit could have no bearing on this case, which is a matter of Mr. Remmer's personal income.

The Court: I understand he was a partner.

Mr. Avakian: But the question was, did you receive a salary as an officer.

Mr. Campbell: No, I said, did you receive a salary from the 186 Club?

(Question read.)

Mr. Avakian: May I make the further objection, the question is uncertain because—

The Court: You may answer the question.

Q. Did you receive any salary from the 186 Club? A. I did not.

Q. Did you receive any share of profits from the 186 Club? A. No, I did not.

Q. At the time, Mr. Lando, that it was changed from a partnership to a corporation, did you receive any shares of stock? A. No.

Mr. Gillen: I think, may it please the court, that I [815] will have to offer an objection and move that the question be stricken upon this grounds, counsel, I am sure, knows when he asks the question in the State of California, when it is a so-called membership corporation, there is no stock.

The Court: Well, the motion will be denied. The answer will stand.

Mr. Gillen: I mean the law does not provide for any stock.

(Testimony of Sylvan Lando.)

The Court: Let it stand and you can clear it up on cross-examination.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [816]

Friday, December 14, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Campbell: May it please the Court, in view of the argument here before the jury yesterday, I would like to read briefly from the record of the testimony of Joseph Billington given on December 5, 1951, in this court room.

Mr. Gillen: I don't have in mind what argument he is talking about.

The Court: I can't see any purpose in reading it now.

Mr. Campbell: As I recall, there is some misunderstanding as to just what the testimony was.

The Court: You might just call counsel's attention to it, but it would be better not to read it again.

Mr. Campbell: Very well, I will.

(Conference between counsel.)

Mr. Gillen: We don't mind whether he reads that or not if he reads the entire testimony of Mr. Billington at that point.

The Court: I do not think it should be read.

SYLVAN LANDO

having been previously sworn, testified as follows
on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Lando, at the time of the recess yesterday afternoon I had been questioning you concerning the 186 Club. I believe [817] you testified that you were first a partner in that Club and then an officer of the Club, is that correct?

A. Correct.

Q. And did you take any active part in the operation of the Club? A. I did not.

Q. How often did you visit the Club?

A. I used to go down there early in the morning maybe a couple of times a week on the way down to my place of business. It was only a block.

Q. Did you, on those occasions, inspect the records of the Club? A. I did not.

Q. Who kept the books and records of the 186 Club? A. I do not know.

Q. Who handled the money that was taken in or paid out with respect to the 186 Club?

A. I do not know.

Mr. Campbell: At this time I am going to ask to have marked for identification certain sheets entitled "Poker" as government's Exhibit 110 for identification as the first group, and the others to be marked 110(a), (b), (c), (d), (e), and (f) for identification, respectively.

Q. Mr. Lando, I am going to show you govern-

(Testimony of Sylvan Lando.)

ment's exhibits 110 to 110(f), inclusive, and ask you if you recognize those sheets?

A. Yes, I do. [818]

Q. And what are those sheets?

A. Well, I imagine they are sheets pertaining—

Mr. Gillen: Well, now, just a moment. If the witness imagines, may it please the Court, it is inconclusive and speculative answer. I move it be stricken.

Mr. Campbell: No objection.

The Court: It will be stricken.

Mr. Campbell: I will reframe the question.

Mr. Gillen: It isn't the question, it's the answer.

Mr. Campbell: I am going to reframe it.

Q. What are those sheets used for?

A. I think they have, I am not sure, reference to players in the club.

Mr. Gillen: I move the answer be stricken for the same reason—"I think—I am not sure."

The Court: Yes, you had better explain that to Mr. Lando.

Mr. Campbell: Mr. Lando, it is necessary that you give a direct answer, if you know. If you don't know, you should say so. You can't state that you think or what you may believe, anything of that kind. Confine your answer to your knowledge. Will you read the question again?

(Question read.)

A. I am in doubt.

Q. You are in doubt?

A. Yes, sir. [819]

(Testimony of Sylvan Lando.)

Q. Mr. Lando, who was the active manager of the 186 Club during the year 1944?

A. To my knowledge, Bert Busterno.

Q. Was he known by some nickname?

A. Bert the Barber.

Q. Who was the active manager during 1945?

A. To my knowledge Bert the Barber.

Q. And in 1946? A. Bert the Barber.

Q. He was the manager throughout that period, is that right? A. That's right.

Q. Were you familiar with the type of game, that is to say, the kind of game, that was played at the 186 Club? A. I was not.

Q. Were you acquainted with the method or manner by which the management derived its profit from the operation of the 186 Club?

A. I was not.

Mr. Gillen: Just a moment, may it please the court, there is no foundation laid that this man had anything to do with the operation.

Mr. Campbell: The record shows he was a partner.

Mr. Gillen: The record shows he was a member of the corporation.

The Court: The answer is evidently satisfactory to all concerned. [820]

Mr. Gillen: Yes, your Honor.

Q. Now, in connection with the same premises, with the 186 Club was there conducted another enterprise? A. There was.

Q. And what was the name of that enterprise?

(Testimony of Sylvan Lando.)

A. The Day-Night Cigar Store.

Q. Now, will you describe briefly the physical set-up of the premises there as to the conduct of the Day-Night Cigar Store and the 186 Club?

A. Well, in front was the Day-Night Cigar Store, cigar stand, magazines and cigars and wholesale liquor store, and in the back room was the 186 Club.

Q. How did you enter the 186 Club?

Mr. Gillen: I don't know as those things are material to a net worth theory.

The Court: That is probably preliminary. The objection will be overruled.

Q. How did you enter the 186 Club?

A. There was a door to the right of the cigar counter as you came in. You went in through there.

Q. You went in through the cigar store?

A. That's right.

Q. Now, I am going to ask you, Mr. Lando, if you were acquainted with one Joe Leonard?

A. I was not. [821]

Q. Were you acquainted with one Bob Burgess?

A. I was not.

Q. Were you acquainted with an individual known as Sacramento Sam? A. I was not.

Q. Were you acquainted with an individual known as Crying Mac? A. I was not.

Q. Referring again to plaintiff's Exhibit 110 for identification, I will show you first Exhibit 110

(Testimony of Sylvan Lando.)

and ask you if you know whose handwriting that is?

A. No, I don't.

Q. I will show you Exhibit 110-A and ask you if you know whose handwriting that is?

A. No, I don't.

Q. I will show you Exhibit 110-C and ask you if you are familiar with the handwriting?

A. No, I am not.

Q. I will show you 110-D for identification and ask you if you are familiar with that handwriting?

A. I am not.

Q. And I will show you 110-F for identification and ask you if you are familiar with that handwriting? A. I am not.

Mr. Gillen: May it please the Court, for the reason that I do not want to offer unnecessary objections, I refrained from [822] objection to the questions concerning the foreign names that were put to the witness on the witness stand of the four people who were named here. At this time, may it please the Court, I ask the Court to strike from the record those names, for this reason—this witness is a government witness who undoubtedly has been interviewed numerous times and statements taken by the government. The prosecutor knows, when he asks the question, that this man did not know these people and I am sure the questions were asked, not for the benefit of this case or to establish any net worth basis, but were asked for the purpose of bringing some ridicule by use of nicknames.

The Court: I can't assume counsel would do

(Testimony of Sylvan Lando.)

anything of that kind. I anticipated your present argument and have been thinking it over and my thought is if it were to appear a little later, or at some time later in the trial, that it was an improper thing to do, I will then strike those references to those names from the record and give instructions to the jury on the point, but at the present time it will stand.

Mr. Gillen: The reason I didn't object—

The Court (Interceding): I am not ruling because you did not object, but that is my thought and I am not going to impute to counsel any such charge.

Mr. Campbell: And I assure your Honor the questions were asked in good faith. [823]

The Court: If it should appear improper later, then, of course I will strike it.

Mr. Gillen: Yes, your Honor, if they are not connected up.

Mr. Campbell: And I assure the Court they will be connected up.

Mr. Gillen: Well, I think that should remain to be seen. I charge—

The Court: Just a moment, counsel, I will take care of that.

Q. Now, Mr. Lando, did you have any interest in the Day-Night Cigar Store? A. I did.

Q. And when did you acquire that interest?

A. When the place was purchased.

Q. When did you first learn of your interest?

A. From Mr. Remmer.

(Testimony of Sylvan Lando.)

Q. When? A. I think it was 1943.

Q. Did you invest any money in the Day-Night Cigar Store? A. No, I did not.

Q. What was the amount of your interest in that? A. I had one-third interest.

Q. And what, if anything, did you pay for that one-third interest? [824]

Mr. Gillen: Objected to as asked and answered. He said he invested no money in there.

The Court: Objection overruled.

Q. What, if anything, did you pay for that one-third interest? A. I didn't pay anything.

Q. Did you, during the year 1944, receive any portions of any profits that were made?

A. I did not.

Q. I call your attention to plaintiff's Exhibit 84, the partnership return of income of the Day-Night Cigar Store for the year 1944, and Schedule I, the distribution of income, showing Sylvan Lando, 611 Marina Blvd., San Francisco, one-third, \$1092.51, and I will ask you if you received that money?

Mr. Avakian: Just a moment, your Honor. We object to that question on the ground that any taxation of partnership income, as the government's own agent, Mr. Gould, testified on the stand yesterday, the income is taxable to the partners—

Mr. Campbell: I object to a speech—

The Court: What is your objection?

Mr. Avakian: We object on the ground it is incompetent, irrelevant and immaterial to this case, because the taxation of partnership income is based

(Testimony of Sylvan Lando.)

not on money the partners may or may not withdraw from the partnership, but rather on their particular share of whatever the partnership income may be, the [825] share they are entitled to. Mr. Gould himself testified to that effect on the stand yesterday. He testified profits were immaterial in determining the taxation of partnership income and I believe counsel well knows that to be the law.

The Court: Objection is overruled. You may answer the question.

Q. Do you have the question in mind?

A. I have not. Will you repeat it?

(Question read.)

A. I did not.

Q. Did you receive it any time, Mr. Lando?

A. No, I didn't.

Q. Incidentally, who was the manager of the Day-Night Cigar Store? A. I do not know.

Q. Do you know who kept the records of the Day-Night Cigar Store? A. No, I don't.

Q. Did you, yourself, take any part in the operation of the business? A. I did not.

Q. Were you advised by any one at the end of 1944 as to whether or not the operation of the Day-Night Cigar Store had been profitable or not?

A. Not that I can recall.

Q. I call your attention to plaintiff's Exhibit 85, partnership [826] return of income of the Day-Night Cigar Store for the calendar year 1945, to Schedule I, showing Sylvan Lando, 611 Marina

(Testimony of Sylvan Lando.)

Blvd., San Francisco, \$897.61, and ask you if you received that amount of money?

Mr. Avakian: We make the same objection as to the same question as to the prior year on the same grounds.

The Court: It will be the same ruling.

A. I did not.

Q. Did you ever at any time receive that money set forth here? A. I did not.

Q. I show you plaintiff's Exhibit 86, the partnership return of income for the calendar year 1946 of the Day-Night Cigar Store, and direct your attention to Schedule I, Sylvan Lando, 611 Marina Blvd., San Francisco, 33 $\frac{1}{3}$, \$652.96, and ask you if you received that money?

Mr. Avakian: We make the same objection as we made with respect to the same question for the year 1944 and for the same reasons.

The Court: It will be the same ruling.

A. I did not.

Q. I call your attention to Schedule H on this exhibit, under the heading "Partners Capital Accounts," Sylvan Lando, beginning of taxable year \$8,492.53, end of taxable year, \$8012.15. Are you familiar with those figures? A. I am [827] not.

Q. Do you know whether or not at any time there were records kept showing a capital account of that amount in your name?

A. I do not know.

Q. Mr. Lando, I call your attention to govern-

(Testimony of Sylvan Lando.)

ment's Exhibit 87-A, the corporation income and declared valuation excess profits tax return of the 186 Club for the fiscal year beginning July 1, 1943, and ending June 30, 1944, and I call your attention to the language respecting annual salaries for officers, Sylvan Lando, treasurer, \$4,000, and ask you if you received any such salary?

A. I did not.

Mr. Avakian: Your Honor, we were unable to locate our copy of this exhibit in time to make an objection. May I ask the Court's permission——

The Court: You may make the objection.

Mr. Avakian: Your Honor, we object to the question on this ground, that it is an inquiry into the matter of the net income of a corporation, namely, the 186 Club, rather than an inquiry into the matter of net income of the defendant in this case. The evidence of the prosecution itself shows, and Mr. Campbell has repeatedly stated, that the 186 Club was a corporation. The taxpayer may have been a shareholder in any number of corporations, but his net income is not affected by what the net income of that corporation is and unless the prosecution shows that Mr. Remmer received income from this corporation, [828] either by way of a salary or by way of dividends, is completely immaterial and this inquiry into whether or not the net income of the 186 Club was one figure and paid certain salaries or not to another witness, not the defendant, is completely immaterial in this case and we submit it is introduced simply for the purpose

(Testimony of Sylvan Lando.)

of trying to confuse the jury and mislead them and we object to any inquiry that is related to net income of a corporation, as distinguished from net income of Mr. Remmer, the defendant in this case.

The Court: Objection overruled and the answer may stand.

Q. Mr. Lando, I am going to show you government's Exhibit 88-A, the corporation income and declared value excess profits tax return of the 186 Club for the fiscal year beginning July 1, 1944, and ending June 30, 1945, and direct your attention to the fact that in this return the annual salaries for the officers were set forth, including Sylvan Lando, treasurer, three thousand dollars. I will ask you if you received any such salary, Mr. Lando?

Mr. Avakian: Same objection, your Honor.

The Court: Same ruling.

A. I did not.

Q. One further question. I may have asked this yesterday but I do not recall, so it may be repetition of the question asked yesterday. Mr. Lando, with regard to the B & R Smoke Shoppe, who kept the records of that business? [829]

A. A Mr. Slater.

Q. And do you know what type of records were kept? A. No, I don't.

Q. Mr. Slater is now deceased, is that correct?

A. That's right.

Q. Mr. Lando, you testified yesterday that at the end of each year the partners in the B & R Smoke Shoppe, that is to say, yourself, Mr. Willie

(Testimony of Sylvan Lando.)

Kyne and Mr. Remmer, had an annual accounting, is that correct? A. That's right.

Q. Do you recall at this time the status of your own account with the B & R Smoke Shoppe as of December 31, 1946? A. I do not.

Q. Do you recall at this time as to whether or not, at the end of 1946, December 31st, the business owed you money or you owed the business money?

A. I don't recall.

Mr. Campbell: I believe that is all. You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Lando, the gentleman you named as the man who kept the books of the B & R Cigar Stand, Mr. Slater, now deceased, he was a public accountant, was he not? A. That's right.

Q. By the way, Mr. Lando, did you ever receive a gift of any [830] Sulka neckties from Mr. Remmer?

Mr. Campbell: Objected to as not within the scope of the direct examination.

The Court: Objection sustained.

Mr. Gillen: May I be heard on that, your Honor.

The Court: I will excuse the jury.

Mr. Gillen: Well, I won't deter the jury at this time. We will take it up at another time. I would like to argue the matter before Mr. Lando is excused.

The Court: You can call it to my attention.

Mr. Gillen: Mr. Lando has been around here quite a while and I don't want to bring him back.

Mr. Campbell: I object to the remarks of counsel.

The Court: We will get along.

Mr. Gillen: Well, don't try to hide material matters.

The Court: Just a minute. I will excuse the jury. Ladies and gentlemen of the jury, there are legal matters that we must take care of and you will be excused for about 15 minutes. In the meantime, please bear in mind the admonition of the Court.

(Jury and alternate jurors admonished and excused at 10:45.)

(In the absence of the jury.)

The Court: I am somewhat at a loss just how to approach this present situation. Now I have tried cases in [831] Los Angeles, I have tried cases in San Francisco, Portland, Seattle, Sacramento, not just one case, but I have been to each one of those cases for more than a month at a time, and I have had the most pleasant relations with lawyers in all those cities, always in Nevada pleasant relations with lawyers, but I notice a tendency, and I think it is your purpose, to ride this Court, Mr. Gillen.

Mr. Gillen: No, it is not my purpose to ride the Court.

The Court: Let me finish what I think your purpose is.

Mr. Gillen: Do you want to bawl me out for the press?

The Court: I am not bawling you out for the press, no, but I am telling you what I think.

Mr. Gillen: I would like to be permitted to tell you respectfully my position.

The Court: I know you are a very competent lawyer, you have demonstrated that, you are ably handling this case, but you do not stay within the rules. Now that remark that you made in the record there just illustrates certain types of remarks you have made during the hearing. Now I do not want to have to put up with any more and I am not going to listen to any more of it, and as far as the press is concerned, this courtroom is open all the time and I will not be influenced by their presence or wouldn't be by [832] their absence. It wouldn't make any difference, but I am reluctant to punish anyone for contempt. I do not want to do it; I don't think I have ever done it but once in nearly nine years I have been on the bench, and I don't want to do it. I am not the kind of man who wants to get even with anybody and my attitude in this case, whether you recognize it or whether you don't, I am trying to be fair to this defendant and to the government and I am going to continue to do that, so let's not have any more of these things.

Mr. Gillen: May I be heard?

The Court: Just let me finish. I am doing the talking here. There is no necessity of that remark. Your remark in making that objection to these nicknames received here, imputing something

against government's counsel—Mr. Campbell has not conducted himself in any way to merit that kind of treatment. That isn't fair treatment of one lawyer to another. This isn't a contest between counsel for the defendant and counsel for the plaintiff. Now we will call in the jury.

Mr. Gillen: You are not going to let me say a word?

The Court: We are going to call the jury.

(Off-the-record remarks by counsel.) [833]

The Court: I will direct the reporter not to put your remarks in the record. Sit down. I will make a finding that your conduct, the remarks made this morning, are in contempt of this court and I will fine you \$100 and you are committed to the custody of the marshal until the fine is paid.

Mr. Gillen: I will pay it right now.

The Court: We will be in recess.

Mr. Avakian: Can't we have what was said here in the record?

The Court: No. We will be in recess for five minutes.

(Recess taken at 10:50 a.m.)

10:55 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. LANDO

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Now, Mr. Lando, you testified yesterday that you had devoted your life to running horses and interesting yourself in horse racing, is that correct?

A. That's right.

Q. You had at one time, I believe you stated, owned a stable of horses yourself?

A. That's right. [834]

Q. That was some years ago, was it?

A. That is right.

Q. Let me ask you whether or not you, in the horse racing fraternity, are known as an expert on horse racing? A. Known as what?

Q. An expert on horse racing?

A. That is right.

Q. And in regard to horse racing and your expertise, that pertains to odds on horses and fixing prices for betting purposes, is that right?

A. That is correct.

Q. And are you well known in the racing fraternity and the sporting fraternity? A. I am.

Q. By people who interest themselves in racing, fighting, and things of that sort? A. I am.

(Testimony of Sylvan Lando.)

Q. Now when the B & R Smoke Shoppe was opened, I understood you to testify that you had been given a one-third interest in a partnership in that, is that correct, the B & R?

A. The B & R, no.

Q. No, a 25 per cent interest, I beg your pardon.

A. That is right.

Q. And I believe you stated as to actual cash, you had made no investment? [835]

A. That is right.

Q. What was it that you were expected to contribute to the partnership?

A. What was I to contribute to the partnership?

Q. Yes, what was it you were expected to contribute to the partnership if it was not money?

A. Well, my knowledge of the game and ability to make prices.

Q. And is that what you did in connection with the partnership, work out odds and make prices?

A. That's right.

Q. And when would you do that, with relation to the hours of the day, when would you do that?

A. From eight in the morning up until around 12:30 and one o'clock.

Q. And then was your work, insofar as your participation of the partnership business, finished for the day? A. Practically was, yes.

Q. I understood you to say at the outset, for a week or two, that you also assisted in writing up bets. A. Yes, when it first started.

(Testimony of Sylvan Lando.)

Q. And after that you just devoted yourself to the matter of making prices from about eight o'clock in the morning and working until around noon? A. That is right.

Q. And for that you were given a 25 per cent interest? [836] A. Right.

Q. Now, with regard to your interest in the 186 Club and in the Day-Night Cigar Store, which was part of the 186 Club property, I understood you to say that you made no actual cash investment in either of those enterprises? A. That's right.

Q. But you were given originally a one-sixth partnership interest in the 186 Club, is that correct?

A. That is correct.

Q. And you were given an interest share in the Day-Night Cigar Stand? A. That is right.

Q. What was that interest, one-third?

A. That's right.

Q. And you testified that you put no actual cash into either of those enterprises by way of investment, is that correct? A. Yes.

Q. What were you expected to contribute to both of those or either of those enterprises in lieu of any cash investment?

A. Well, I had a big following amongst sportsmen in the city. They would call me up in the morning 10 or 15 times, where I was working, for tips on the horses, my opinion as to prices, along those lines.

Q. Were you expected, by reason of your following, to bring business to the 186 Club? [837]

(Testimony of Sylvan Lando.)

A. That is right. I sent them up there, quite a few.

Q. Those people of the sporting fraternity knew you were interested in this place and followed you over to this place and gave you their business, is that correct? A. That is right.

Q. Now, the B & R Cigar Shoppe, you stated that there were empty boxes in the cigar store?

A. To my knowledge, yes.

Q. Did you ever tend the cigar store; was that part of your work? A. No.

Q. Was there a man who did tend the cigar store there? A. Not that I know of.

Q. Was there a man at the front there at the cigar counter? A. I do not recall.

Q. At all events, you never tended the cigar store? A. No.

Q. Now, you were asked by Mr. Campbell regarding the amount of time that was devoted by the defendant, Mr. Remmer, to the B & R cigar store and you said he was active in the business, is that correct? A. That is right.

Q. Let me ask you, isn't it a fact that during the time that you were connected with the B & R Cigar Store and with the other enterprises, that Mr. Remmer spent five months of the year [838] managing and operating Cal-Neva Lodge in Nevada?

A. That's right.

Q. Isn't it a fact that he went up there in April or May of each year and didn't return until some

(Testimony of Sylvan Lando.)

time in October, with the exception of possibly short trips to San Francisco?

A. To my knowledge that is correct.

Q. So for five months of the year, each year that you were there Mr. Remmer wasn't around there to be active in the business, was he? A. Right.

Q. And then I believe you stated in the year 1945 for the first five months of the year no tracks were running at all? A. That is right.

Q. And the B & R Cigar stand was closed up?

A. Right.

Q. And Mr. Remmer was at Lake Tahoe all the time when the tracks opened until October of that year? A. That's right.

Q. So that that year he was there practically at no time during the year 1945, is that correct?

A. That is correct.

Q. And that was the year, was it not, that the other partner in that business, Mr. Willie Kyne, went into the armed forces services, is that correct?

A. Correct. [839]

Q. And he was away until 1946, isn't that true?

A. That is true.

Q. And immediately after Mr. Willie Kyne went away, it is true, is it not, that you for a period of time did handle the funds, for a short period of time? A. I did.

Q. And you were mistaken yesterday when you said Mr. Pritchett had handled them?

A. He did.

Q. He did, but you had handled them for a brief period of time, is that correct?

(Testimony of Sylvan Lando.)

A. Repeat it, please.

Q. Yes. I said Mr. Pritchett had handled the funds when Mr. Kyne went away into the service, but there was a brief period of time immediately after Mr. Kyne went away that you handled the funds, isn't that correct? A. That is right.

Q. Now, Mr. Campbell asked you yesterday questions regarding what is known in the fraternity of the racing world as laying off of bets; do you recall those questions? A. That is right.

Q. And you explained to Mr. Campbell yesterday that there were two reasons for laying off bets; one was to keep the odds on a horse and the other was if a man who was making a book felt he had too much of a gamble, he would lay off part of it, that [840] is right? A. That is right.

Q. He would ask some other bookmakers if they would take part of the bets that were available, is that correct? A. Correct.

Q. Now, is it not a fact that frequently and most times that laying off, or accepting of laying off bets, or assisting in laying off bets, is done as an accommodation? A. At times it is, yes.

Q. Just explain how it is done as an accommodation and doesn't bring anything in the way of a profit or emolument to the person who lays off the bet?

A. Well, a man may call up from New Orleans, around the country around post time, which gives you 10 or 15 minutes, and say, "I am in bad"—

(Testimony of Sylvan Lando.)

Q. He means he has too much money on a horse?

A. Yes, he has too much, for example two thousand on a horse, and he has taken this order and wants to execute it and get rid of it, so I would say, "Wait, hang on and I will see what I can do for you." So if you get rid of the money, or part of the money, whatever you got rid of, then it would be around post time—

Q. Let me see if I can break that down so I understand a little better. If A felt he had too much to cover bets placed on one horse and wanted to rid himself of that obligation, he [841] might call B and ask if he would take part of the order for him? A. That is correct?

Q. So Mr. B, might as accommodation, ring up C, D, E, and F and ask them if they were interested in taking some of that?

A. That is correct, or fill the order or try to fill the order.

Q. And in that regard Mr. B, who was first appealed to, would be merely acting as middle man, trying to accommodate the man who was wanting to get rid of the obligation?

A. That is correct.

Q. Was there much of that done at the B & R?

A. Over a period of time lots done.

Q. If you make a long-distance call to another person to lay off a bet, you then incur a telephone bill? A. That is right.

Q. And got nothing out of it?

(Testimony of Sylvan Lando.)

A. That is all merely an accommodation.

Q. And that was done for the reason that on other occasions those same people who had appealed to you might have accommodated you in taking some lay-off money, that is correct?

A. Right.

Q. Now, that money would sometimes pass through your hands without any profit, isn't that correct? A. That is right.

Q. Now, you stated that you do not recall any man tending the [842] B & R cigar stand. Do you remember a man called John the Door Man?

A. Yes.

Q. Didn't he tend the cigar stand?

A. Well, he may have, but I don't remember.

Q. Now, Mr. Lando, to your knowledge was there not also a bookkeeper to whom was turned over the financial accounts from the various enterprises? A. I don't think so.

Q. Well, you mentioned here the public accountant who had died, Mr. Slater. It was within your knowledge, was it not, that the report of profits and losses were ultimately turned over to Mr. Slater and he worked at the books and made up the income tax returns, isn't that true? A. That is right.

Q. Now, in the year 1945, which we have referred to here in your testimony, was that a so-called loss year, that is, when the B & R Smoke Shoppe lost money?

A. I don't recall. That's a matter of record from the tax returns, would show it.

(Testimony of Sylvan Lando.)

Q. Well, wasn't that the year the race tracks were closed down all over the country for a period of five months? A. Yes, they were.

Q. Do you have any recollection now whether that was a loss year or a profitable year? [843]

A. I am not sure, but I think it was a loss year.

Q. Mr. Lando, do you recall that on your own individual income tax return for the year 1945 you showed it as a loss year? A. I think I did.

Q. And you attribute that, do you not, to the fact that there was no business for the first five months of that year, insofar as the racing game was concerned? A. That's right.

Q. Now, Mr. Lando, with regard to the 186 Club, which was described by you as a card room adjoining or related to the Day-Night cigar stand, you had an interest of one-sixth in that 186 Club, is that correct? A. That is correct.

Q. And you stated at the outset you were informed that you had a one-sixth partnership interest, is that correct? A. That is correct.

Q. And that some little time later—I believe you fixed the time as approximately a year after the place opened—that you were informed that it had become a corporation and that you were an officer of the corporation? A. That's right.

Q. Now, do you recall what other information you obtained regarding how and in what manner it was converted from a partnership to a corporation? A. I don't know. [844]

Q. Does it refresh your recollection that a Mr.

(Testimony of Sylvan Lando.)

Mooser, an agent of the Internal Revenue Department, in auditing the accounts and returns of the 186 partnership, decreed that it was a corporation rather than a partnership and that a return should be made as a corporation?

Mr. Campbell: I am going to object unless the foundation is laid, unless he had a conversation with Mr. Mooser regarding the subject matter. Otherwise it is hearsay.

The Court: Let me have the question.

(Question read.)

The Court: Will you lay a little foundation, Mr. Gillen, on that question?

Mr. Gillen: I think perhaps I can.

Q. Mr. Lando, I am going to ask you whether or not, by way of refreshing your memory, whether or not it came to your attention that in the return of the 186 Club for the fiscal year commencing July 1, 1943, and ending June 30, 1944, that this information was contained in Schedule I—and I am reading now from plaintiff's Exhibit 87-A in evidence—

Mr. Campbell: Pardon me, before you read that, Mr. Gillen, I am going to make an objection to the question in this form. I think the document should first be shown to the witness as to whether or not he has ever seen the statement he referred to. It is quite a lengthy statement.

Mr. Gillen: I think, may it please the Court, since it [845] is an exhibit put in by the prosecu-

(Testimony of Sylvan Lando.)

tion in evidence, that it is evidence and I am entitled to read any part of it and ask him if that refreshes his recollection as to what were the facts in the matter.

Mr. Campbell: Oh, yes.

The Court: Very well.

Mr. Gillen: I am going to read you, Mr. Lando, from plaintiff's Exhibit 87-A in evidence, and ask you whether or not this notation in the return of the corporation, in which you were an officer, refreshes your recollection on the subject matter of my last question. Schedule I: (Reads.)

Q. Does that refresh your recollection on the subject matter, Mr. Lando, or are you familiar with that?

A. I recall there was a Mr. Mooser and he changed from the original partnership to the corporation and that is as much as I am familiar with. I am not familiar with the transaction.

Q. Now, Mr. Lando, you say that the active manager of the club was Mr. Bert Busterno, who was also known by the nickname of Bert the Barber, is that correct? A. Yes.

Q. And so far as you know, he was the man who kept track of the accounts and ultimately turned them over to the public accountant, is that correct? A. That's right, yes.

Q. Was the 186 Club, during the time that you were connected [846] with it, making money or losing money?

(Testimony of Sylvan Lando.)

A. Well, I don't know whether it was or it wasn't.

Q. You don't remember whether it was making money or losing money?

A. No, all I know it was mostly in the red around there. That is what I was told, on account of the markers.

Q. What do you mean by that, Mr. Lando? Is that that people who owed money to the club put in their markers instead of putting in cash, is that correct? A. That's right.

Q. In other words, instead of the club getting a lot of money, it was getting IOUs?

A. Correct.

Q. Which in the racing fraternity are referred to as markers? A. That's right.

Q. When were you informed about this? Were you informed about this when you asked whether or not you had money coming from the 186 Club?

A. That's right.

Q. Now, in regard to the income tax returns of the corporation which Mr. Campbell read to you at the close of your direct examination, on which it is shown that you during one year, according to the return, received four thousand dollars' salary and another year that you drew three thousand dollars' salary. Let me ask you, Mr. Lando, whether or not on your individual income [847] tax return you reported receiving such salary?

A. The monies I received—

Q. (Interrupting): First of all, let me ask you

(Testimony of Sylvan Lando.)

if you remember, then you can give any explanation you wish. Do you remember whether or not you reported in your own income tax return you had received any salary? A. I do not remember.

Q. You don't know whether you did or not?

A. No, I do not.

Q. Were you ever given any money to cover any tax for any salary that was chargeable to you on the books of the corporation? A. Yes, I was.

Q. By whom were you given that money?

A. Willie Kyne.

Q. And who was it that made out your individual tax return? A. The tax man.

Q. Who was that? A. Mr. Hubner.

Q. Is that Conrad Hubner, the tax lawyer in San Francisco? A. Yes.

Q. And the money Mr. Kyne gave you to pay your tax for the salary that was supposed to have been given to you, did you pay that to the government on your income tax? A. I did. [848]

Q. Who did you turn that over to, Mr. Hubner?

A. Mr. Hubner.

Q. How did you happen to pay that tax? Were you told by Mr. Kyne that you were chargeable with having received such a salary and therefore would be taxable for it, would have to pay a tax on it? A. That is right.

Q. So that, if we may attempt to boil this all down to an understandable statement of your testimony, summarizing what you have testified to, you were supposed to receive a salary by way of re-

(Testimony of Sylvan Lando.)

ward for your participation in the corporation—

Mr. Campbell: Just a minute—I am going to object to counsel characterizing or summarizing or giving his summary of the testimony. I think the testimony speaks for itself. I object to this question as incompetent.

The Court: Let me have the question.

(Question read.)

The Court: You may answer the question.

Mr. Gillen: I didn't complete the question, your Honor.

Mr. Campbell: I thought you had.

Mr. Gillen: No. Mr. Lando, I will start over again. Let me withdraw that. It will be simpler and I will start over again.

Q. The fact of the matter is, regarding the money situation, Mr. Lando—and correct me if I am misquoting your testimony— [849] the fact of the matter is that you were supposed to receive and were put down on the corporation's books, as having received a certain fixed salary, is that correct?

A. Correct.

Q. And you did not receive that salary and in inquiring about why you did not receive it, you learned that the 186 Club had its coffers filled with markers or IOUs rather than cash, is that correct?

Mr. Campbell: That is objected to as assuming a fact not in evidence.

The Court: I understood it to be a question. You are not stating he testified to that effect?

(Testimony of Sylvan Lando.)

Mr. Gillen: I am asking if that was the sense of his testimony and if I am in error he can say so.

The Court: I will sustain the objection to the form of the question.

Q. And it is a fact that you testified, in inquiring why you did not receive any money from the corporation, learned it was because the 186 Club was not making any money, due to the fact that it was receiving so many IOUs or markers?

Mr. Campbell: Objected to as assuming a fact not in evidence.

The Court: Objection sustained.

Mr. Gillen: I would like the record referred to, may it please the Court. If your Honor will recall, the reporter [850] started to read back and Mr. Lando elucidated on his answer and said the place was losing money because of markers. Your Honor will recall that.

The Court: My opinion of this question is you are summarizing the testimony of this witness.

Mr. Gillen: I am asking him on cross-examination, which I always understood was permissible, if this is the sense of his testimony.

Mr. Campbell: That is asking him to characterize or summarize his testimony.

The Court: I think counsel has the right to inquire what the witness meant when he gave certain evidence.

Mr. Campbell: But I think if he is referring to testimony he has given, the question must refer exactly to the testimony which was given.

(Testimony of Sylvan Lando.)

Mr. Gillen: Let us read it out of the record.

The Court: Let us have the question.

(Question read.)

The Court: You may answer the question.

Q. Do you have the question?

A. That is right.

Q. Is that the fact? A. That is correct.

Q. Now, is it also the fact that regardless of your not having received any money, your income tax lawyer told you that because [851] you were put down for a salary, you would have to pay a tax on the amount of money that was due you, is that correct? A. That's correct.

Q. And is it a fact that you went then to the corporation, or Mr. Kyne, or whoever it was and advised them that you were going to have to pay taxes on the money you did not receive because the corporation did not have the money to give you, and asked them what you would do about the tax you would have to pay, is that correct?

A. That is correct.

Q. And they advanced you the amount of tax you would have had to pay on the salary that was owing to you, is that true?

A. That is correct.

Q. Now, then, you still have that credit on the books of the corporation known as the 186 Club, isn't that so? A. I have.

Q. Now, with regard to the Day-Night cigar

(Testimony of Sylvan Lando.)

stand which was attached to the 186 Club, I understood you to testify that you did not receive any money out of that enterprise either, is that correct? A. That is correct.

Q. And that regardless of the fact that the income tax return for the Day-Night cigar stand showed there was a profit? A. Right.

Q. But you did not receive any of that [852] profit? A. I did not.

Q. Now, it is a fact, is it not, Mr. Lando, that the profit that was made by the Day-Night cigar stand was put right back into the business and used for purchasing of merchandise?

A. That's right.

Q. Are you familiar with the partnership return of the Day-Night cigar stand for the year 1944 and the Day-Night cigar stand for the year 1946 and for the year 1945, and I will identify it in the record as prosecution's Exhibits 84, 85, and 86, and with the Court's permission, I will hand these exhibits to the witness. Are you familiar with those?

A. No, I am not familiar with it.

Q. Well, will you look at the first one I handed you, the year 1944, prosecution's Exhibit No. 84. You will note, do you not, that this is income tax return for the partnership known as the Day-Night Cigar Store, 186 Eddy Street, San Francisco 2, California, and that the business conducted there is cigars, liquors and periodicals, that was correct, was it not? For the year 1944 I am referring to.

Mr. Campbell: I am unable to understand the

(Testimony of Sylvan Lando.)

question as to what he is directing his attention to as being correct.

Mr. Gillen: What I read appears on the exhibit.

Mr. Campbell: The exhibit speaks for itself, I submit, the witness having testified he has never seen the exhibit. I make the objection the document speaks for itself. [853]

The Court: See if you can answer the question.

Q. Have you the question in mind?

A. I have the question in mind, yes, but I am not familiar with it.

Q. Well, you stated, did you not, that the money that was made by the Day-Night cigar stand, instead of being paid out in profits to the partners or salaries, was put back into the business for the purchase of merchandise? A. That is true.

Q. It is true, is it not, that the 1944 returns shows that the inventory for the beginning of the year is put down as \$11,889, is that correct?

A. That's what is here.

Q. And then if you will look at plaintiff's Exhibit 85 in evidence, you will note, will you not, that the inventory—and that is for the year 1945, the next year—that the inventory for that year increased from \$11,889 to \$24,747.27, isn't that what appears there? A. That is right.

Q. And then if you will look at plaintiff's Exhibit 86 for the year 1946, you will note that the inventory shows for that year as \$22,466.44, or twice as much as at the beginning of the period, namely, the year 1944, is that correct?

(Testimony of Sylvan Lando.)

A. Yes.

Mr. Campbell: The same objection, the documents speak [854] for themselves.

The Court: The answer may stand.

Q. Now, with regard to the Day-Night cigar stand, let me ask you whether or not your income tax lawyer advised you that you would also be chargeable in your individual income tax with the profit that you were shown to have made at the Day-Night cigar store partnership, is that correct?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Gillen: That is the same question as your Honor permitted with regard to obtaining money to pay tax on money that was credited to him.

The Court: Isn't that hearsay, Mr. Gillen?

Mr. Gillen: I don't think so. If I may have the question read.

(Question read.)

Mr. Gillen: Do you mean about his lawyer?

The Court: Yes.

Mr. Gillen: I will withdraw the question. It is very definitely, I suppose, hearsay.

Q. Let me ask you this, did you obtain from the Day-Night cigar stand sufficient money from that partnership to pay the individual income tax obligation of your own to the government for any profit that was due you out of it?

A. I did. [855]

Q. Now, did you know, Mr. Lando—you have

(Testimony of Sylvan Lando.)

the original up there, would you take a look at the year 1946 return, which is on the desk there before you, and it is prosecution's Exhibit 86, and if you will turn to the last page—did you know that there was for the taxable year of 1946 credited to you a partner's capital account credit of \$8,491.53? You see under Schedule I where it says "Partner's Shares of Income and Credits."

A. I see.

Q. And you see your name there, Sylvan Lando, 611 Marina Blvd., Schedule H, Mr. Lando, line 13, it says, "Partners Capital Accounts."

A. I see it.

Q. Sylvan Lando, \$8,491.53, do you see that?

A. I do.

Mr. Campbell: May we have the question?

Q. I will put the question again. I will ask you, were you acquainted with the fact that that capital investment credit was credited to you in the return of the partnership?

A. I really don't understand. Will you repeat it, please?

(Question read.)

A. I get that much credit. It was put back into the business, that is what I was told.

Q. Well, you had put no money into that business? A. No, I didn't.

Q. And you had been given one-third of that business, as you [856] stated, by reason of your following in the sporting fraternity, is that correct?

A. Yes.

(Testimony of Sylvan Lando.)

Q. And were you aware of the fact that you had built up an equity, so to speak, in that business in that amount? A. That is correct.

Mr. Gillen: We are reaching the matter not determined over the last recess, and that is in regard to the Sulka tie question.

The Court: We will take our recess now.

(Jury and alternate jurors admonished and recess taken at 11:45.)

December 14, 1951—2:10 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. LANDO

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Lando, shortly before the close of the noon session, I asked you about the money that you still had on the books in those enterprises; do you recall that? A. Yes.

Q. Now, were you ever called upon to make up any of the losses of the B & R Smoke Shoppe, of which you were a 25 per cent partner? [857]

A. I was not.

Q. You were not? A. I was not.

Q. Now, in direct examination this morning, Mr.

(Testimony of Sylvan Lando.)

Campbell asked you, or perhaps it was yesterday afternoon, Mr. Campbell asked you what you did in connection with any of those enterprises in the way of work or active participation, do you recall the question? A. Yes, I do.

Q. Did you, among other things that you did in and about the enterprises, did you ever recommend what customers of any of the enterprises might be given Christmas gifts of Sulka ties or other gifts?

A. I did.

Q. Did you ever participate in preparing or wrapping Sulka ties for customers?

A. Yes, I did.

Q. You got some ties yourself?

A. That is one there.

Q. You have a Sulka tie on now?

A. That's right.

Q. By the way, was that a gift by Mr. Remmer to you? A. That's right.

Mr. Gillen: That is all. [858]

Redirect Examination

By Mr. Campbell:

Q. Mr. Lando, in response to Mr. Gillen's question, you stated that when you inquired about the profits of the 186 Club you were told that they were represented in markers, is that correct?

A. That is right.

Q. Now, do you know whose markers those were? A. No, I have no idea.

(Testimony of Sylvan Lando.)

Q. Do you know whether or not they were the markers of Mr. Remmer? A. I do not know.

Q. Did you, yourself, ever see the markers?

A. No, I never did.

Mr. Campbell: I think that is all.

(Witness excused.)

WILLIAM E. KYNE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. William E. Kyne.

Q. Where do you reside, Mr. Kyne?

A. Christmas Tree Inn, Mt. Rose Highway, near Reno.

Q. You are presently the manager of that establishment? A. Part owner.

Q. Did you formerly reside in San [859] Francisco? A. Yes, I did.

Q. And over what period of time?

A. For 42 years.

Q. And up until what time, Mr. Kyne?

A. A year ago last July.

Q. What is your present business or occupation?

A. Part owner of the Christmas Tree Inn.

Q. Are you acquainted with the defendant here, Elmer Remmer? A. Yes, I am.

(Testimony of William E. Kyne.)

Q. How long have you known Mr. Remmer, Mr. Kyne? A. Over 20 years.

Q. Have you in the past been associated with him in business? A. Since about '41.

Q. Are you presently associated with him in business?

A. Well, I have my name on two licenses.

Q. Well, aside from having your name on two licenses, do you presently have any business interests in common with him? A. No.

Q. And when did you cease to have business interests in common with Mr. Remmer?

A. About February 4, 1949.

Q. Now you stated, I believe, that your association began in 1941? A. Correct.

Q. Do you recall the month of the year? [860]

A. December 1, 1941.

Q. And continued, as I understand you, until 1949? A. That's correct.

Q. Now what was the first business in which you became associated with Mr. Remmer?

A. First business was B & R Smoke Shoppe at 50 Mason Street.

Q. In San Francisco? A. That is right.

Q. What was the nature of that business?

A. Book making.

Q. By book making do you refer to book making on horse races? A. Horses, strictly.

Q. You say "strictly." In other words, it was entirely confined to that type of wager?

A. That's right.

(Testimony of William E. Kyne.)

Q. What was the next enterprise that you became associated with him?

A. 110 Eddy, a tavern.

Q. When did you become associated with him in that enterprise?

A. I believe it was, oh, it was either '42 or '43.

Q. And what was the next enterprise you became associated with him in those enterprises? [861]

A. The 186 Club and the Day-Night Cigar Store.

Q. Do you recall the date that you became associated with him in those enterprises?

A. No, I can't remember the exact date. I believe it was shortly after the 110 deal.

Q. What was the nature of the business of the 186 Club?

A. 186 Club was a social club and card room.

Q. And what was the nature of the Day-Night Cigar Store?

A. A cigar store, running 24 hours a day.

Q. Was it also a liquor store? A. Yes.

Q. And what was the next business that you became associated with him in after that?

A. Menlo Club.

Q. Where is it located?

A. 33 Turk Street.

Q. What was the nature of its business?

A. Card room.

Q. And what was the next business you became associated with him? A. That was it.

Q. Do you recall the Transit Smoke Shop?

A. Oh, I am sorry, yes, the Transit Smoke Shop.

(Testimony of William E. Kyne.)

Q. Now have you completed the list?

A. That's it. I missed the Transit Smoke Shop.

Q. Do you recall when you became associated in the Transit Smoke shop?

A. 1946, November. [862]

Q. Were you at any time associated with Mr. Remmer in the operation of Cal-Neva?

A. No, I was not.

Q. Were you at any time associated with Mr. Remmer in the operation of the 21 Club or San Diego Social Club? A. No.

Q. Were you and Mr. Remmer at any time associated together in a venture relative to the purchase of Gallagher and Burton whiskey?

A. I think I bought the check to make the payment for it.

Q. Now turning first to the B & R Smoke Shoppe, which you say was located at 50 Mason Street, in the City of San Francisco, and which I believe you testified to be engaged in the business of booking horses, now what was the ownership of that business, that is to say, was it a partnership, a corporation, or sole proprietorship?

A. It was a partnership, Remmer 50 per cent, Lando 25 per cent, and Kyne 25 per cent.

Q. Did you contribute any of the investment in that business, Mr. Kyne? A. No, I did not.

Q. At the time that business was acquired, was it operated by some one else?

A. Yes, it was operated by a man called Sherwood.

(Testimony of William E. Kyne.)

Q. Sherwood? A. A. Sherwood. [863]

Q. Was any consideration or money paid to Mr. Sherwood at the time the business was acquired?

A. I believe the purchase price was \$2,500.

Q. By whom was that paid? A. Remmer.

Q. Did you or Mr. Lando contribute any of that purchase price? A. Nothing.

Q. Now in connection with the operation of that business, was it necessary that there be a bank roll?

A. Yes, sir.

Q. And what was the amount of the bank roll used in the operation of the B & R Smoke Shoppe?

A. Seventy-five hundred.

Q. Who contributed that? A. Remmer.

Q. When was that originally put up?

A. December 1, 1941.

Q. Now how long did that business continue to operate?

A. I operated it until February 14, 1945.

Q. You went into the service at that time?

A. Yes, sir.

Q. When did you return from the service?

A. Went back to work June 8, 1946.

Q. And when you came back to work June 8, 1946, was the B & R Smoke Shoppe [864] operating? A. At the time I don't think it was.

Q. Was it subsequently reopened?

A. Yes.

Q. And do you recall when?

A. I can't recall. At times we closed down for

(Testimony of William E. Kyne.)

a month or two, due to different things. On my return I don't think it was operating.

Q. How soon after you returned, if you recall?

A. Well, my books will show that.

Q. Did you keep the records of the B & R Smoke Shoppe? A. Yes, sir.

Q. Of what did those records consist?

A. They consisted of one entry each day, whether we lost or won.

Mr. Campbell: At this time, if the Court please, I wonder if certain of the records in the clerk's possession can be produced. I am referring to certain books and records. I wonder how physically we can do that? I am referring to certain records which are in the clerk's office.

(Clerk produces box of records.)

Q. I am going to show you—

Mr. Golden: Just a minute—we object to the opening of this material to the witness, whether or not it is offered in evidence, and move to suppress its use by the government, on the ground it is illegally obtained and violates the defendant's [865] constitutional rights, for all the reasons heretofore stated in our many motions, and we again offer to adduce evidence to show the circumstances of the original obtaining of these books by the government.

Mr. Campbell: I think that matter has been thoroughly covered.

The Court: Yes. The objection will be overruled.

(Testimony of William E. Kyne.)

Q. I am going to show you a volume with the imprint on the outside, "Daily Reminder 1942," and ask you if that is one of the books to which you refer? A. That is right.

Mr. Campbell: I ask that this be marked for identification as government's next in order—111 for identification.

Q. I show you a similar volume with the imprint on the outside, "Daily Reminder," and the year 1943, and ask you if that is also a book which you maintained relating to that business?

A. Yes, sir.

Mr. Campbell: I will ask that this be marked 111-A for identification.

Q. I show you a volume with the imprint, "Standard Daily Journal 1945," and direct your attention to the first page and ask you if that is a record which you made?

A. It looks like my writing.

Q. Is that a volume which you kept in connection with that business? [866] A. Yes, sir.

Mr. Campbell: I will ask that this be marked 111-B for identification, 1945.

Q. I show you a plain leather bound volume, upon which on the first page appears date January 1, 1946, and ask you if that also is a record maintained by you in the conduct of the B & R Smoke Shoppe? A. Those are my figures; yes, sir.

Mr. Campbell: I will ask that this be marked Exhibit 111-C.

Q. Mr. Kyne, was a similar book kept for the

(Testimony of William E. Kyne.)

year 1944? A. I believe you have it here.

Q. Could you step down and examine these books and see if you can identify it?

(Witness examines box.)

A. It isn't there.

Mr. Golden: May we offer the same objection to that procedure and the further objection there is no showing that has been brought into the court room all the material deposited with the clerk.

The Court: I wish you would make your objection before the procedure was carried out.

Mr. Golden: It was such an unusual procedure I couldn't see what it was.

The Court: If there is anything wrong, I don't see how [867] it could be cured now.

Mr. Golden: We could do it this way. I move your Honor to advise the jury that the inability of the witness to find in one box a certain book has no significance.

The Court: I so advise the jury, the inability of the witness to find a certain record in a box has no significance.

Mr. Campbell: May I inquire if the clerk has brought in all the records?

The Clerk: No, your Honor, there are other records.

The Court: Did you ask the clerk to bring them all in?

Mr. Campbell: That is what I understood. Possibly we can pass this matter until the recess and those records can be examined at that time.

(Testimony of William E. Kyne.)

The Court: Very well, all right.

Q. Now so far as the years in question which are represented by these four volumes, 1942, 1943, 1945, and 1946, are these the only records maintained with respect to the B & R Smoke Shoppe?

A. That's correct.

Q. And were they maintained by you as part of your duties as a partner there? A. Yes, sir.

Mr. Campbell: I am going to offer these in evidence.

Mr. Golden: To which we object upon all the grounds heretofore stated. [868]

The Court: Does counsel desire to examine them?

Mr. Golden: Well, yes, perhaps we had better. Of course, your Honor, the further objection as to 111 and 111-A that they cover the years 1942 and 1943, which are not years covered by the indictment. Pardon us just a moment. Your Honor, while we are going over these proffered exhibits, may I have permission to question the witness on his voir dire concerning the exhibit which Mr. Campbell had him come down and look for, the potential exhibit he had him look for, namely, a diary for the year 1944?

The Court: There is nothing before the Court in regard to that now, Mr. Golden.

Mr. Golden: I know there isn't, but I would like to request it.

The Court: I will deny your request.

Mr. Golden: Now then, if the Court please, I wish to assign as misconduct on the part of the

(Testimony of William E. Kyne.)

prosecution the procedure whereby the witness was asked to look through these records for diary for the year 1944, on this ground, your Honor, that it was not included in the material which the government turned over to Mr. Semenza, it is not included in the subpoena directed to Mr. Semenza, it was therefore not deposited with the clerk, although it appears in the record here, and having the witness search for it in the presence of the triers leaves an inference the defendant is withholding something. The [869] government knew they were not here.

The Court: The record will show the assign and the Court again instructs the jury not to draw any inference from the circumstance where the witness left the stand and went down with counsel to look at the records. Have you finished your examination of the books?

Mr. Golden: Yes, we have looked at them.

The Court: You have stated your objections on all the grounds heretofore stated?

Mr. Golden: Yes, your Honor. Does your Honor feel the record is quite clear as to what the grounds are?

The Court: You may state them if you want to, if you are not satisfied with the record. Of course, the Court is. Just state your grounds if you are not satisfied with the record.

Mr. Golden: I have, in mind this matter, we were going to take up further with the Court when these things were offered in evidence. Your Honor will recall that. In other words, we were protesting

(Testimony of William E. Kyne.)

originally with the deposit and the Court said when they were offered in evidence we will take it up further.

The Court: Yes, yesterday we had an argument and I suggested some question and we had quite a discussion, which I think satisfies the Court.

Mr. Golden: We object to all four, that is 111, 111-A, [870] 111-B, and 111-C, on the grounds that they were illegally obtained and retained by the agents of the prosecution and that their acquisition and retention and use at this trial violates the constitutional rights of the defendant; namely, the fourth and fifth amendments of the Constitution of the United States; that the agents of the prosecution promised to return them to the persons from whom they got them at the time they got them and did not keep their promises, and we offered, of course, as your Honor knows, to show a factual basis for those objections by evidence of witnesses, and we further object to the proffered Exhibits 111 and 111-A on the grounds they are incompetent, irrelevant and immaterial, in that they apparently cover years which are not within the scope of this indictment, and we move to suppress the same and for their return to us and suppress their use in evidence and for their return to us, as well as objecting to their introduction in evidence.

The Court: Objection overruled and the motion will be denied and the Exhibits 111, 111-A, 111-B, and 111-C, will be admitted in evidence.

Mr. Campbell: May I ask your Honor that the

(Testimony of William E. Kyne.)

jury be advised to disregard the factual statements made by counsel?

The Court: Yes, I think the jury will understand from other matters which have occurred here. I want to remind the jury once more—and it seems unnecessary to do it—that this case is to be decided entirely [871] upon testimony from the witnesses and documents which are admitted in evidence and any remarks of the Court or counsel, exchanges back and forth, are not evidence and are not to be considered; just the evidence of the witnesses and contents of the documents which are admitted. So the jury will disregard any evidence other than testimony of witnesses and contents of the documents admitted.

Q. Mr. Kyne, in regard to the operation of the B & R Smoke Shoppe, in addition to your personal interest of 25 per cent, did you draw any salary?

A. Ten dollars a day.

Q. And was that throughout the period until you went into the army and after you returned from the army?

A. Before I went to the army.

Q. After you returned from the army, did you continue to draw that amount?

A. No, I didn't.

Q. Did you draw any salary after that?

A. No.

Q. Now at all times when you were present, that is to say excluding the period of time that you were in the army, at all times that you were present and

(Testimony of William E. Kyne.)

while the business was in operation, so that we are excluding periods of a month or so being closed for various reasons, who was in charge of the [872] business?

A. I was.

Q. And who handled the money?

A. I did.

Q. Who paid the expenses of the business?

A. I paid the expenses.

Q. Were you here in court when Mr. Lando testified? A. Yes, sir.

Q. Now you will recall that he testified there were two phases of the operation of that business, first it operated as an open pool room, is that correct?

A. Yes, sir.

Q. Do you recall over what period of time that was?

A. Until about the end of '44.

Q. And will you describe what is meant by open pool room operation?

A. It is where any one can walk in from the sidewalk and walk through the door and place a bet.

Q. Incidentally, this enterprise was called the B & R Smoke Shoppe. Will you state whether or not there was any merchandise by way of smokes or tobacco for sale there?

A. We had some boxes out in front on different shelves.

Q. Will you state whether or not there were cigars in those boxes?

A. They were dummy boxes.

(Testimony of William E. Kyne.)

Q. Did you have any merchandise for sale there at all in the [873] front part of the store?

A. No, sir.

Q. There is reference made here to one John, the Doorman. Do you know him?

A. Yes, sir.

Q. What is his name, if you recall?

A. I forget his name. The social security will show.

Q. What were his duties?

A. Well, we couldn't allow every one in; for instance, if a person was drinking or something, we didn't want them in there and it was up to him to keep them out.

Q. In other words, I take it his duties were somewhat as his name implies, John, the Doorman? He watched the door, is that correct?

A. That is correct.

Q. Now I am going to call your attention to Plaintiff's Exhibit 111, the daily reminder of 1942, as an example, and calling your attention to the first entry therein of Thursday, January 1, 1942, \$7,300 cash BR, will you state to what that refers?

A. That would mean bank roll.

Q. The figure is repeated below the line, \$7,300, then appears \$19.25 win, to what does that refer?

A. That was the day's winnings.

Q. And the final figure, \$7,319.25, what would that then represent? [874]

A. That is what was there.

(Testimony of William E. Kyne.)

Q. Would you state whether or not that would represent the bank roll at the end of the day?

A. Yes, sir.

Q. Will you glance through here and see if that same method of accounting is used throughout the year? A. That seems to be it.

Q. Now referring to the figures for "Win" or "Lose," there are, are there not, certain days on which there was a loss, isn't that correct?

A. Yes, sir.

Q. Will you state whether or not the figure of "Win" or "Lose" for the day as set forth in this Government's Exhibit 111, is a net or gross figure?

A. Net.

Q. And will you state whether or not that figure is arrived at before or after expenses had been paid? A. After.

Q. And will you state whether or not that included all expenses of doing business?

A. Yes, sir.

Q. For example, did that include salaries?

A. Yes, sir.

Q. And the expenses that were deducted before the figure was arrived at? [875] A. Yes, sir.

Q. Did that include your daily salary?

A. Yes, sir. What year was that?

Q. This happens to be 1942 that I show you.

Mr. Gillen: I think we ought to offer an objection concerning the details as being incompetent, irrelevant, and immaterial and not within the time in the confines of the indictment, which commenced

(Testimony of William E. Kyne.)

in the year 1944, and ends in the year 1946, those are the three years concerned.

The Court: It is part of the same discussion we had early in the trial on the question of the starting point, pertaining to the same ideas.

Mr. Avakian: I don't believe so. These questions are not directed to establishing net worth at the end of any particular year, but rather are details of the transactions that occurred during the year and I do not see that they would have any relevancy on the question of net worth at the end of the year.

Mr. Campbell: I might state I am asking these questions as to operation of business and how the figures were arrived at and it is material to the net worth of this defendant and to the starting point, as will be developed.

Mr. Avakian: Your Honor, that is a simple statement of conclusion. There is no explanation offered as to the manner in which he kept books in 1942 would throw any light on net [876] at the end of any particular year, or more specifically at the beginning of this indictment period. Now if the materiality will develop later, the proper foundation should be laid. If this is simply an example, then one of the years of the indictment period should be used.

Mr. Campbell: I think the materiality will develop.

Mr. Avakian: Your Honor, in fairness to all, shouldn't there be a statement how this would become material?

(Testimony of William E. Kyne.)

Mr. Campbell: Possibly I can shorten the argument by asking another question.

Q. I call your attention to the entry shown of December 31, 1942, the final figure \$14,872.80, do you observe that? A. Yes.

Q. What does that figure represent?

A. That was what was left.

Q. Was that what you have termed the bank roll? A. Bank roll, yes.

Q. And before arriving at that figure, had all of the expenses of doing business during the year been deducted? A. Yes, sir.

Q. And with respect to the win or lose figure as set forth below, did that figure represent then a net figure after expenses had been deducted?

A. Yes, sir.

Q. Now I call your attention to Government's Exhibit 111-A, [877] which purports to be the record for 1943, and I call your attention to the first entry under January 1, 1943, \$15,000 BR, what does that figure represent? A. Bank roll.

Q. I call your attention to the fact that the last entry on December 31, 1942, was \$14,872.80, so that there is a difference of some \$27.20 in the opening bank roll of 1943, do you recall the circumstance?

A. Some one may have paid a marker.

Q. Now in connection with the operation of the business, were all of the bets which you accepted cash bets? A. No, sir.

Q. Was or was not credit given to some of the customers?

(Testimony of William E. Kyne.)

A. On the phone and also at the counter.

Q. I call your attention in Government's Exhibit 111-A to two pages, the last two pages in the book, under the heading "Memoranda," with certain names and amounts and ask you to what that refers? For example, on the back page here is an entry, "Dugan, \$80.00"? A. That is correct.

Q. To what does that refer?

A. He has a marker.

Q. Will you explain what you mean by marker?

A. One who bets and does not pay in this respect.

Q. In connection with the obligation of \$80, were you holding [878] any document of any kind representing that obligation?

A. You mean a note?

Q. Yes. A. No, sir.

Q. Or an IOU? A. No, sir, just his word.

Q. Now I notice there is quite a column of those notations there opposite names, running in amount from \$5 to \$80, I believe is the highest, is that correct? A. Yes, sir.

Q. Do they all represent what you call markers or obligations of those who have not paid you?

A. Yes, sir, the IOUs are still in the book.

Q. Were those ever paid, if you know?

A. There are two items which have been paid and marked paid, Aleck, the barber, and Eddie Woods.

Q. And can you tell when those items were paid?

A. Aleck, the barber, paid February 22nd and Eddie was paid on March 29th.

(Testimony of William E. Kyne.)

Q. Of what year?

A. It must have been '44.

Q. Well, these were outstanding markers at that time? A. Yes, sir.

Q. I call your attention to the preceding page, where there are certain amounts and names set forth in red ink, running from [879] \$5 to the amount appears \$1,527.25.

A. That is the total, isn't it?

Q. Isn't that a subtotal?

A. Total, yes. I think that also includes the preceding page. No, that does not include the preceding page.

Q. What are these in red ink?

A. Those are markers, also.

Q. Now the fact that only one of these is scratched out, what would that indicate to you?

A. Evidently it was marked up.

Q. As to the others, were they outstanding at the end of the year? A. Yes, sir.

Q. I call your attention to a page in the memorandum in which appears the following language: "Total winnings \$7,796.15," is that in your handwriting?

A. No, sir, that is not in my handwriting.

Q. Do you know in whose handwriting that is?

A. I wouldn't have any idea. That is a copy of that amount on that page there.

Mr. Avakian: Can Mr. Campbell identify the page on which that appears so the record may be clear?

(Testimony of William E. Kyne.)

Mr. Campbell: First page, Memorandum 1943. This is 111-A.

Q. As I understood your testimony, the character of the business changed in 1944? [880]

A. Toward the end of '44; yes, sir.

Q. What was the method of operation of the business after that change? Do you recall the date of that? A. No, I do not.

Q. What was the nature of the method of operating the business after that change?

A. A phone business.

Q. After you returned from the army, when you became associated with the business again, what was the nature of the business, that is, by phone or by open pool? A. Phone business.

Q. You went into the army early in 1945?

A. February 14th.

Q. And you returned when?

A. The end of May. I went to work June 8th.

Q. And as I recall your testimony, you said it was closed for a while after you returned?

A. I believe it was. It was on a month and then off.

Q. Now I call your attention to Plaintiff's Exhibit 111-C, which purports to be a record for the year 1946, and I call your attention to the date of September 30th, upon which appear, I believe, the first entries in that book. You might examine the book to make sure that is correct; beside the date 1946 appearing on the first page, is that correct?

A. I believe so, yes. [881]

(Testimony of William E. Kyne.)

Q. I believe you stated that this record is kept in your handwriting? A. Yes, sir.

Q. Now I call your attention to the fact that apparently this is a little different type of record than the preceding one, is that correct?

A. That is the way the government wanted it.

Mr. Gillen: I move to strike that as not responsive.

Mr. Campbell: I agree, it is not responsive.

The Court: It may go out.

(Question read.)

A. That is correct.

Q. I call your attention to the first item, \$19,936 pay, what does that represent?

A. That is what we paid out.

Q. The next item, \$12,698T, what is that?

A. The take.

Q. And the final, \$7,248 L? A. Loss.

Q. So those were the losses for that day, is that correct? A. Yes, sir.

Q. Now for the next day, October 1st, first item is \$16,050 T? A. Take.

Q. And 12,413.75 P? A. Play. [882]

Q. And 3,636.25 W? A. Win.

Q. When you refer to "play," that refers to the gross amount of bets accepted for that day?

A. Yes, sir, that is the handle.

Q. By "handle" you refer to the amounts of bets that were handled?

A. The money that we handled; yes, sir.

(Testimony of William E. Kyne.)

Q. And by "pay," you refer to the amount that is paid out to those that were fortunate enough to bet a winner? A. Yes, sir.

Q. And by subtracting one from the other you then determine your winnings or losings for that day? A. Correct.

Q. Now will you state whether or not in the figure "pay" as set forth in this volume, Government's Exhibit 111-C, are the expenses of the business taken out? A. Yes, sir.

Q. So they then become a part of pay-out?

A. Correct.

Q. For example, if on a given day you paid your rent—incidentally, were those premises rented?

A. Yes, sir.

Q. And do you recall the rent that was paid?

A. \$275, that included a warehouse and store-room. [883]

Q. Was that a month? A. Yes, sir.

Q. And was that paid monthly?

A. Yes, sir.

Q. And was that paid, if you recall, by cash or by check?

A. I don't remember. Usually cash. The agent for the Wilson estate used to come around. I am pretty sure it was cash.

Q. On the day that that was paid, will you state whether or not that was added to the "pay" figure as set forth in these records?

A. That would be taken out; yes, sir.

Q. So that included in the figure of "pay-out"

(Testimony of William E. Kyne.)

here is not only the payments which you made to winners of bets, but also the expenses of the business? A. Yes, sir.

(Jury and alternate jurors admonished and recess taken at 3:12.)

3:20 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now in further explanation of this record, I call your attention to Plaintiff's Exhibit 111-A, book relative to 1943, and call your attention to the fact that, for example, on [884] January 19, 1943, there appears some four figures with names opposite them in amount, middle of the page: 250—Johnny; 525—Fisher; 200—Switzer; 3050—Gus. To what does that refer?

A. It is in reference to our accounts. I don't know whether it was a carry-over or what it was, but that is what it refers to.

Q. Does that refer to money owed to the B & R or by the B & R? A. Right now I forget.

Q. Do you know who any of these individuals are? A. Yes, sir.

(Testimony of William E. Kyne.)

Q. For example, 3050 Gus, who is that?

A. Greenbaum.

Q. And your answer, I presume would be the same where other such notations appear?

A. Yes, except it paid out or something going out.

Q. I see notation 250 here?

A. Abdo, Tony Abdo.

Q. Now in relation to the B & R Smoke Shoppe, Mr. Kyne, did you maintain a bank account?

A. I believe we did; yes, sir.

Q. And do you recall in what bank that was maintained?

A. That would be the Bank of America, No. 1 Powell.

Q. I show you Government's Exhibit 29, photostatic copy of a commercial account in the name of B & R Smoke Shoppe, 50 Mason Street, Bank of America, Day and Night Office, together [885] with signature cards thereof, and ask you if these are the records of the bank account which you refer to as being maintained by the B & R Smoke Shoppe? A. Yes, sir.

Q. And were you the only authorized signator on that account? A. Yes, sir.

Q. Now during the time that you were in the service, do you know who handled the financial business of the B & R Smoke Shoppe?

A. No, I don't.

Q. I will ask you whether or not there was also opened an account in the Crocker First National

(Testimony of William E. Kyne.)

Bank in the name of the B & R Smoke Shoppe, and for the purpose of refreshing your recollection, I will show you Plaintiff's Exhibit 23, containing the commercial account ledger sheets and signature card on that account.

A. I opened it up. I forgot it.

Q. Do you recall that account, Mr. Kyne?

A. July 17, 1946—I may have opened this account and I left it down there and got a safe deposit box also, probably at the same time.

Q. Do you recall opening that account now?

A. I really don't.

Q. That is your signature on the signature card?

A. Yes. I remember going down there and getting a safe deposit [886] box but I don't remember opening up this account.

Q. Now in connection with the operation of the B & R Smoke Shoppe, was a safety deposit box maintained? A. Yes, sir.

Q. Where was that safety deposit box?

A. No. 1 Powell Street, Bank of America.

Q. That is the Day and Night office of the Bank of America? A. Yes, sir.

Q. And do you recall the number of that box?

A. Forty-eight.

Q. Over what period of time did you maintain that box? A. I still have it.

Q. Do you recall approximately when you opened that box?

A. It was opened since we have been in business.

(Testimony of William E. Kyne.)

Q. Since 1941? A. Yes, sir.

Q. And who, in addition to yourself, had access to that box? A. Elmer Remmer.

Q. Did any one else have access to it?

A. No, sir.

Q. In connection with your association with Mr. Remmer and these various businesses, was more than one safety deposit box maintained?

A. By myself?

Q. Yes, by yourself and in connection with the business? [887]

A. I had two other boxes directly with the business.

Q. And where were they located?

A. One was at No. 1 Powell and the other was at the Crocker Bank.

Q. I am going to show you Government's Exhibit 25 for identification, which has heretofore been identified by a representative of the Crocker National Bank, with relation to safety box No. 730, and ask you if that is your signature?

A. Yes, sir.

Q. Does that relate to the box to which you refer in the Crocker National Bank?

A. Yes, sir.

Q. I call your attention to the signature, "Henry Clay."

Mr. Gillen: The defense will stipulate the signature, "Henry Clay," is in the handwriting of the defendant, Elmer Remmer.

Q. Is that correct, Mr. Kyne?

(Testimony of William E. Kyne.)

A. Yes, sir.

Q. It would appear here that the box was opened on February 29, 1944, and was surrendered on March 5, 1947, does that coincide with your recollection, Mr. Kyne?

A. I don't remember the exact date.

Q. You do recall that the box was given up?

A. That's correct.

Q. I call your attention to the fact that the address given [888] under the signature of Henry Clay is St. Francis Hotel. Did Mr. Remmer maintain a residence in the St. Francis Hotel?

A. He lived there at the times when he was in town.

Q. What business was this particular box under the name of William E. Kyne and Henry Clay used for?

A. Well, we took that box out because we had an account there with the Menlo Club.

Q. And was that box used in connection with the Menlo Club business? A. No, it was not.

Q. Was it used in connection with any particular business? A. No, sir.

Q. Now in regard to the operation of the B & R Smoke Shoppe, there has been some testimony here relative to what is known as layoff bets. Will you state whether or not it was the practice of the B & R Smoke Shoppe, during the time that you were in active management, both to receive and place layoff bets? A. Yes, sir.

Q. And did that practice continue throughout

(Testimony of William E. Kyne.)

the time of operation from the beginning and up until the end of 1946?

A. It would happen almost every race.

Q. Now with regard to the acceptance of layoff bets, Mr. Kyne, will you state whether or not it is customary for a commission to be paid?

A. No, sir. [889]

Q. Did either the acceptance or the placing of layoff bets by the B & R Smoke Shoppe involve a payment or receipt of commissions?

A. Will you repeat that question?

(Question read.)

A. We received commission in one spot. We used to have access to the mutuels at the California Jockey Club and they paid us, I believe, 2½ per cent commission. That was the only place that we received money during our layoff operations.

Q. Were bets which you had accepted then placed directly with the Jockey Club?

A. Well, the only time we used to take advantage of it was when we were loaded on horses.

Q. And in placing bets with the Jockey Club, do you refer to placing bets which would go then to the pari mutuel machine at the track?

A. Yes, sir.

Q. And over what period of time was that practice followed?

A. It was a very short period. The California Racing Commission objected to it.

Q. Do you recall in what year that method was followed?

(Testimony of William E. Kyne.)

A. You have the checks, the photostat of the checks.

Q. In that connection and in connection with all of your layoff business, either where you were accepting or where you were laying off bets yourself, what was the method of settlement [890] used?

A. Mostly cashier's checks.

The Court: I think we will take a recess now until Monday morning at 10:00 o'clock.

(Jury and alternate jurors admonished and recess taken at 3:45 p.m.) [891]

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